

**No.**

**6**

**AND**

**7**

Nos. 6, 7

Office Supreme Court,  
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# In the Supreme Court of the United States

OCTOBER TERM, 1951

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE  
OF THE UNITED STATES, PETITIONER

DELBERT O. STARK, A. E. STRATTON, A. R. DENTON,  
G. STEBBINS, AND F. WALSH

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION,  
INC., PETITIONER

DELBERT O. STARK, A. E. STRATTON, A. R. DENTON,  
G. STEBBINS, AND F. WALSH

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE



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# In the Supreme Court of the United States

OCTOBER TERM, 1951

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CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE  
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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
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---

BRIEF FOR THE SECRETARY OF AGRICULTURE

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PRIOR OPINIONS

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 470)

is reported in 185 F. 2d 871. The opinion of the District Court is reported in 82 F. Supp. 614. The original opinion of the Court of Appeals is reported in 136 F. 2d 786. The opinion of the Supreme Court reversing and remanding the case for further proceedings is reported in 321 U.S. 288.

#### JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 9, 1950 (R. 488). The petitions for writs of certiorari were filed on February 6, 1951, and were granted on April 16, 1951 (R. 491). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

#### QUESTIONS PRESENTED

1. Whether the Agricultural Marketing Agreement Act of 1937 confers on the Secretary of Agriculture latitude to provide in the Boston milk order for payments, out of the producer-settlement fund, to co-operative associations of producers for the performance of market-wide services found by the Secretary to be necessary since 1941 in order to make effective the classification, pricing, and pooling provisions in the milk order?

2. Whether as a matter of law the provisions in the Boston milk order for payments to co-operative associations of producers for the performance of market-wide services are "inconsistent" with the provisions in § 8c(5) of the Agricultural Market-

ing Agreement Act of 1937 relating to a uniform price for milk?

3. Whether the authorization in the Agricultural Marketing Agreement Act of 1937 for "necessary" and "incidental" provisions in a milk order imposes such a harsh requirement that these provisions included in the order, on the basis of evidence adduced at a public hearing, and conceded by the reviewing court to be beneficial, helpful, and pronounced aids to all participants in the program since 1941, are nonetheless as a matter of law not necessary?

4. Whether the provisions of a milk order may be held invalid as not being "necessary" and "incidental" when the record before the reviewing court does not include the extensive hearing record on which the Secretary based his findings and issued the regulatory provisions?

#### STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. § 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The economic objective of milk orders was modified, in some respects, by the Act of July 3, 1948 (62 Stat. 1247, 1258, 7 U.S.C. Supp. IV, § 602(1)), but the Congress provided in Title III, § 302(e), of that enactment (7 U.S.C. Supp. IV, § 672(b)) that all orders then in effect "shall continue in effect

without the necessity for any amendatory action," but shall be continued in effect only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose of the Act. The pertinent statutory provisions are in Appendix A, *infra*, pp. 89-95.

The declared policy of the Act is to establish and maintain such orderly marketing conditions for milk as will establish, as the prices to farmers, parity prices as defined in the Act. But whenever the prices thus determined for a marketing area are not reasonable, in view of the various economic factors affecting the market supply and demand for milk and its products, the Act directs the fixing of such prices as will reflect those economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest (§ 8c(18)). The Act provides that milk orders shall "accord such recognition and encouragement to producer-owned and producer-controlled co-operative associations as will be in harmony with the policy toward co-operative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution" (§ 10(b)(1)).

A milk order may be issued only after a public hearing (§ 8c(3)) and upon a finding, based on the evidence adduced at the hearing, that the order and all of its provisions will tend to effectuate the declared policy of the Act (§ 8c(4)). An order becomes effective only upon a determination by the

Secretary that the issuance thereof is approved by the requisite percentage of producers (§ 8c(5) (B) (i) and § 8c(8)). Handler approval is also provided in § 8c(9) of the Act, but if the requisite handler approval is not obtained, the order may be made effective on the determination that the order is the only practical means of advancing the interests of the producers pursuant to the declared policy of the Act.<sup>1</sup>

The Act outlines the provisions which a milk order may contain. In addition to the statutory authorizations in § 8c(5) for the classification, pricing, and pooling of milk, additional or auxiliary provisions may be included under § 8c(7) (D) if such provisions are

Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) [of § 8c of the Act] and necessary to effectuate the other provisions of such order.

The order involved is the order regulating the handling of milk in the Boston marketing area (7 CFR 904.1 *et seq.*). The order was amended on

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<sup>1</sup> Approval by the President was required by § 8c(9) of the Act whenever the requisite percentage of handlers failed to execute a marketing agreement. But acting pursuant to the Reorganization Act of 1945 (5 U.S.C. 133y *et seq.*), the President abolished by § 102 of the "Reorganization Plan No. 1 of 1947" the function of the President with respect to approving determinations by the Secretary in connection with the issuance of marketing orders under the Act. 93 Cong. Rec. 4359, 4380-4382; 12 F.R. 4534; and 5 U.S.C. Supp. IV, 133y-16. Reorganization Plan No. 1 of 1947 became effective on July 1, 1947.

August 1, 1941, to provide for payments to co-operative associations of producers (6 F.R. 3762; 7 CFR 1941 Supp. 904.9). The order was again amended on August 1, 1947, to include the provisions now in effect for payments to co-operatives (12 F.R. 4921; 7 CFR 1947 Supp. 904.10). The relevant findings and the pertinent provisions of the order are in Appendix B; *infra*, pp. 95-106.

#### STATEMENT

This action was instituted as a class action by five dairy farmers to enjoin the Secretary of Agriculture from making certain payments to co-operative associations of producers pursuant to the Boston milk order. It is alleged in the complaint (R. 1, 6) that the uniform blended price for milk is illegally decreased by virtue of the deduction from the pool of the payments made to the co-operative associations of producers, and that such payments to the co-operative associations of producers are not authorized by the statute. The respondents assert that the only issue is one of statutory authority to make the deductions for the payments to the co-operatives. *Stark v. Wickard*, 321 U.S. 288, 307.

The suit was originally dismissed by the District Court on the ground that the Act vests no legal cause of action in milk producers, as distinguished from milk handlers who are regulated by the order, and the judgment of the District Court was affirmed by the United States Court of Appeals for the District of Columbia. *Stark v. Wickard*, 136 F. 2d 786.

That decision, however, was reversed by this Court in *Stark v. Wickard*, 321 U.S. 288, which held (at p. 306) that the respondents as dairy farmers "have legal standing to object to illegal provisions of the order." The District Court was directed by this Court (at p. 311), in the remanding of the case, to consider "whether the statutory authority given the Secretary is a valid answer to the petitioners' contention."

On remand, the District Court was of the opinion that the statute does not depute authority to the Secretary to include in a milk order any of the provisions for payments to the co-operative associations of producers, and the court enjoined the Secretary from making further payments under the Boston milk order to the co-operative associations of producers (R. 154-155). The effectiveness of the judgment<sup>2</sup> was stayed by the District Court on condition that all of the payments be held in escrow pending the final disposition of the case on appeal (R. 156-157), and the co-operatives who qualify for payments are continuing to perform the services that are required by the order. The judgment of the District Court was affirmed by the United States Court of Appeals for the District of Columbia Circuit, with Judge Edgerton dissenting (R. 470, 487).

<sup>2</sup> The Dairymen's League Co-operative Association, Inc., a qualified co-operative for payments under the New York milk order (7 CFR 927.1 *et seq.*), intervened as a party defendant (R. 51-52). The intervenor-defendant appealed from the judgment of the District Court (R. 157-158).

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Agricultural Marketing Agreement Act of 1937 does not confer on the Secretary of Agriculture latitude to provide in the Boston milk order for payments, out of the producer-settlement fund, to co-operative associations of producers for the performance of market-wide services found by the Secretary to be necessary since 1941 in order to make effective the classification, pricing, and pooling provisions in the milk order.

2. In holding that as a matter of law the provisions in the Boston milk order for payments to co-operative associations of producers for the performance of market-wide services are "inconsistent" with the provisions in § 8c(5) of the Agricultural Marketing Agreement Act of 1937 relating to a uniform price for milk.

3. In holding that the authorization in the Agricultural Marketing Agreement Act of 1937 for "necessary" and "incidental" provisions in a milk order imposes such a harsh requirement that these provisions included in the order, on the basis of evidence adduced at a public hearing, and conceded by the reviewing court to be beneficial, helpful, and pronounced aids to all participants in the program since 1941, are nonetheless as a matter of law not necessary.

4. In holding that the provisions of a milk order may be held invalid as not being "necessary" and

"incidental" when the record before the reviewing court does not include the extensive hearing record on which the Secretary based his findings and issued the regulatory provisions.

#### SUMMARY OF ARGUMENT

### I

The issues in the case relate to whether there is statutory authority for certain provisions in the Boston milk order. The order was amended in 1941 so as to provide for payments to co-operative associations of producers as reimbursement to the co-operatives for the performance of certain market services. These provisions in the order were revised by additional amendments in 1947. The payments are not made to all co-operatives but are made to the co-operatives that are approved, from time to time, by the Secretary as qualifying for the payments by virtue of the performance of market services.

A. The Secretary found, on the basis of evidence at the hearing on which the 1941 amendments were based, that the co-operative payments are for "performing certain marketing services" that are (1) incidental to the classification, pricing and pooling of milk, (2) necessary to effectuate the provisions of the order, and (3) are not inconsistent with the provisions under § 8c(5) of the Act. These findings were ratified and affirmed with respect to the order as amended in 1947, and then the Secretary

found that all of the terms and conditions in the order as amended in 1947 are necessary to effectuate the declared purpose of the Act.

The record before the Court does not include the extensive hearing record on which the Secretary based his findings in 1947 and issued the present provisions in the milk order for co-operative payments (12 F.R. 4921). In the absence of the evidence on which the findings and the provisions in the order are based, the Court assumes the existence of sufficient evidence to support the action by the Secretary. *Niagara Hudson Corp. v. Leventritt*, 340 U.S. 336, 340. No question arises, therefore, as to whether substantial evidence on the record as a whole, supports the findings by the Secretary. The only issue is one of law as to whether, assuming the existence of facts which adequately support the Secretary's findings, the provisions in the order for payments to co-operatives, for performing market-wide services, are within the terms of the Act.

B. The provisions to be included in milk orders are outlined in § 8c(5) and § 8c(7) of the Act. The introductory requirement in § 8c(7) of the Act is that an order shall contain "one or more" of the provisions in that section, one of which authorizes the inclusion of provisions that are

Incidental to, and not inconsistent with, the terms and conditions specified in subsec-

tions (5), (6), and (7) [of § 8c] and necessary to effectuate the other provisions of such order.

The Boston order is based on both § 8c(5) and § 8c(7) of the Act. The order provides for the classification, pricing, and pooling of milk under § 8c(5) of the statute. But milk for which a producer can find no market is not classified, priced, or pooled. In view of this limited scope of the Act and the order, it is necessary, under the factors of economic instability in the Boston milkshed, for co-operative associations of producers to perform certain marketing services.

The co-operatives that qualify for payments perform market-wide services with respect to the marketing problems incident to the seasonal surplus and the seasonal shortage of milk. The production of milk in June in the Boston milkshed is almost twice as much as it is in November. The seasonal variance in the production of milk has plagued the Boston market and some other metropolitan marketing areas for a long time. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 549-550; *H. P. Hood & Sons v. United States*, 307 U.S. 588, 593; *Nebbia v. New York*, 291 U.S. 502, 517-518. Whenever the producers in the milkshed have surplus milk it must be utilized in some outlet if an adequate annual supply is to be maintained in the public interest. The co-operatives are compelled to handle a proportionately larger share of surplus

milk than the proprietary handlers, and in doing so the co-operatives incur expenses and losses in the performance of this service. Also, a co-operative that receives payments must exercise full authority in the sale of the milk of its members, and the activity by a co-operative in finding a market outlet for milk on the fluid milk market maximizes the uniform price to all producers inasmuch as fluid milk distributors are able to obtain milk on short notice to meet the maximum Class I demands. The majority opinion in the Court of Appeals, in referring to these activities by the co-operatives, stated that (R. 484):

There is no doubt that these services [by co-operative associations of producers that receive payments] are pronounced aids to all participants in the marketing area—producers, handlers and consumers. This is so clear that it serves no purpose to describe the helpful effects in detail.

In order for the regulatory program to attain the goal of the statute the co-operatives that receive payments under the order perform, at considerable expense, a variety of market services. Any such co-operative is required by § 904.10 of the order to maintain "a competent staff for dealing with marketing problems," and must collaborate with similar associations in the maintenance and strengthening of the operation of the plan of uniform pricing of milk to handlers. The order provides for two rates of payment under § 904.10(b),

and the higher rate is descriptive of the market service of a co-operative in assuming responsibility for operating milk plants to meet the needs of the market. Also, price fixing under the order is not static; and the work of co-operatives in connection with amendment hearings has been of great value in the operation of this program.

The opinion below, recognized the beneficial character of the market services by the co-operatives, but held that the services could not be regarded as "necessary." In a remedial statute, however, the word "necessary" does not mean indispensable, essential, or vital. *Armour & Company v. Wantock*, 323 U.S. 126, 129-132; *McCulloch v. Maryland*, 4 Wheat. 316, 413-414. It is sufficient that the provisions in the order are needed in attaining the declared purpose of the Act, and that the omission of the provisions would handicap the achievement of the Congressional purpose. Moreover, the remedy selected in this instance is in accord with the requirement of § 10(b)(1) of the Act that the provisions of a milk order shall "accord such recognition and encouragement to producer-owned and producer-controlled co-operative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution."

C. It was also held below that co-operative payments are "opposed to the express requirement [in the Act] of uniform prices to producers subject only to the deductions and differentials set out in the Act" (R. 485). The Boston order provides for a market-wide pool, and under § 8c(5)(B)(ii) of the statute the price shall be "uniform \* \* \* for all milk so delivered" subject to the variations or adjustments authorized by the Act. The only statutory requirement in this regard relates to a uniform price "for all milk." The payments to the co-operatives are for market services. A payment for market services is not a payment for milk. There is, therefore, no basis for saying that the payments to the co-operatives for the performance of market services violate the statutory requirement for a uniform price for milk. Also, the terms of the Boston order are plain that the uniform price is paid without any variation or adjustment for the payments to the co-operative associations of producers. In computing the uniform price, the method adopted provides for various subtractions and additions under § 904.8 of the order. One of the deductions is for the payments to the co-operatives for market services, and this deduction is made before the uniform price is obtained under the terms of the order.

The statute "does not specify the detailed method by which a blended or uniform price is to

be computed." *Green Valley Creamery v. United States*, 108 F. 2d 342, 345 (C.A. 1). Congress did not attempt to itemize the provisions that may be included in milk orders, and such provisions "are largely matters of administrative discretion." *Stark v. Wickard*, 321 U.S. 288, 310. No method is specified in the Act for fixing the class prices under § 8c(5)(A) or the uniform price under § 8c(5)(B). A milk order may be based on "one or more" of the terms and conditions in § 8g(5) and in § 8c(7) of the statute. Any method may be used—with minor exceptions not relevant in this case—in computing the uniform price if such method is found by the Secretary, on the basis of evidence adduced at a public hearing, to be necessary to effectuate the declared purpose of the Act.

Latitude in this respect is essential in order to attain the legislative goal of orderly marketing, the insurance in the public interest of an adequate supply of milk, the encouragement of co-operative associations of producers, and the promotion of efficient methods of marketing and distribution. The methods of pricing used in various milk orders have provided for numerous subtractions and additions not specifically referred to in the Act, but these provisions in the computation of the uniform price are not at all inconsistent with uniformity. Under the uniform price, the producers may receive more or less than the aggregate value computed at class prices. The New York order, effective September 1, 1938, provided for diversion

payments to handlers for market-wide services, and the payments to the handlers under the New York order constituted an unrecoverable charge against the producers. See, *Grandview Dairy v. Jones*, 157 F. 2d 5, 6 (C.A. 2), certiorari denied, 329 U.S. 787. The Louisville milk order and several other orders provide for deductions in computing the uniform price in order to provide a fund for seasonality payments in an effort to encourage a more even production of milk throughout the year. In milk licenses and milk orders that were issued during the period 1933-1937, deductions or additional payments were made to various agencies, as compensation for the performance of special services to the market.

The payments to co-operatives under the terms of the Boston order, therefore, are "not inconsistent" with the statutory requirement that there be a uniform price for milk under § 8c(5) of the Act. The market services by the co-operatives are more extensive than those referred to in § 8c(5) (E) of the Act, but insofar as the market services by the co-operatives relate to supplying market information by means of radio programs and otherwise to nonmembers, the payment for such market service is expressly authorized by § 8c(5) (E). The Act provides for milk orders to be based on "one or more" of the provisions in the statute, some of which are somewhat repetitive, and § 8c

(5) (E) does not purport to be exclusive or to prohibit other necessary provisions that are within the terms of other sections of the Act.

D. Assuming, *arguendo*, that co-operative payments are variations or adjustments in the uniform price for milk, any such variation or adjustment is authorized by § 8c(5) (B) of the Act and also by § 8c(7) (D) of the Act. An adjustment may be made under § 8c(5) (B) of the statute in order "equitably to apportion" the total value of the milk among producers and associations of producers on the basis of their marketings of milk during a representative period of time. The payments to the co-operatives are necessary in order to apportion, in a fair and equitable manner, the total value of the milk among producers and associations of producers. The representative period of time is the calendar month. The payments to the co-operatives are made from the producer-settlement fund, and in this way the deduction applies necessarily on the basis of the marketings of milk by all of the producers. This provision of the Act is of wide and general application, and there is nothing to indicate a narrow or restrictive scope. Also, an additional adjustment may be based on § 8c(7) (D) of the Act. The references in § 8c(5) (A) and § 8c(5) (B) of the statute to the adjustments therein set forth as being the "only" adjustments in the uniform prices are qualified by the

introductory reference "except as provided in subsection (7)" of § 8c.

## II.

The administrative construction at issue in this case has been recognized and approved by Congress. The statutory amendments in 1935 were for the purpose of authorizing methods of classifying, pricing, and pooling that were included in the milk licenses that had been issued, and some of those licenses provided for payments for the performance of special market services. In 1937 Congress reenacted the marketing provisions of the statute and also ratified and confirmed the licenses, orders, regulations, and acts thereunder. In 1940 the Senate passed a bill which expressly authorized payments to co-operatives for market services. It was stated in Sen. Rep. No. 1719, 76th Cong., 3rd Sess., p. 8, that the authority to provide for payments to co-operatives for market services "is already contained in the act" and that the purpose of the amendment was merely to establish more explicit standards. No action was taken on that bill in the House. Also the Act was further amended in 1948, and the amendment directed that all milk orders "shall continue in effect without the necessity for any amendatory action."

## III

There is no doubt of the broad administrative construction of the Act over the period of the last

18 years. The contemporaneous and settled administrative construction should not be overturned unless clearly wrong or unless a different construction is clearly required.

#### ARGUMENT

- I. The Statute Confers on the Secretary of Agriculture Latitude to Provide in the Milk Order for Payments, Out of the Producer-Settlement Fund, to Co-operative Associations of Producers for the Performance of Market-wide Services Found by the Secretary to Be Necessary Since 1941 in Order to Make Effective the Classification, Pricing, and Pooling Provisions in the Order.

The Act outlines in § 8c(5) and § 8c(7) the terms and conditions to be included in milk orders. The prefatory part of § 8c(5) of the Act requires an order to contain "one or more" of the provisions authorized by that section, and the introductory requirement in § 8c(7) of the Act is that an order shall contain "one or more" of the provisions set forth in that section, one of which authorizes the inclusion of provisions that are

Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) [of § 8c] and necessary to effectuate the other provisions of such order.

The Boston order is based on both § 8c(5) and § 8c(7) of the Act. The majority of the court below held that the deductions for payments to co-operative associations of producers, as provided for in the Boston order, are "inconsistent" with

the terms of the Act because the payments are "opposed to the express requirement [in the Act] of uniform prices to producers subject only to the deductions and differentials set out in the Act" (R. 485), and also the court held that these provisions in the order do not comply with the statutory standard of necessity which the court characterized as a "harsh" requirement (R. 484). We shall demonstrate that the co-operative payment provisions are (1) "incidental to" the other terms and conditions specified in the Act and "necessary to effectuate the other provisions of such order," *infra*, pp. 26-51, and (2) "not inconsistent with" the other provisions of the Act, *infra*, pp. 52-73. But before coming to these substantive questions, a statement as to the limited scope of the issues before the reviewing Court should help to place the case in correct posture.

A. *Since the record before the Court does not include the extensive hearing record on which the Secretary based his findings and issued the present provisions in the milk order for co-operative payments, the provisions of the order cannot be held invalid, from an evidentiary standpoint, as not being within the statutory standards.*

The provisions in the Boston order for payments to co-operative associations of producers, for the performance of certain market services, were included in the order by amendments that became

effective in 1941 and these provisions were revised by amendments in 1947, *infra*, Appendix B, pp. 95-106.

The Secretary found, on the basis of the hearing record on which the 1941 amendments were based, that the provisions in the order for co-operative payments for "certain marketing services" are (1) incidental to the classification, pricing, and pooling of milk, (2) necessary to effectuate the provisions of the order, and (3) not inconsistent with the provisions under § 8c(5) of the Act, *infra*, Appendix B, pp. 95-96. These provisions of the order with respect to co-operative payments were again amended in 1947, and at that time the previous findings were ratified and affirmed with respect to the order as amended in 1947. The Secretary also found that all of the terms and conditions in the order as amended in 1947 are necessary to effectuate the declared purpose of the Act, *infra*, Appendix B, pp. 95-96.

The record in this case includes the hearing record with respect to the original amendments in 1941, relative to co-operative payments, but does not include the record of the hearing with respect to the amendments in 1947 on the basis of which the payments are now being made to the co-operatives. Unless the latter hearing necessarily be regarded as irrelevant, the omission of the testimony there adduced from the record in this case precludes any challenge, from an evidentiary standpoint, to the Secretary's findings.

The court below justified its reliance on the 1941 record exclusively on the ground that the amendments in 1947 involved only "slight procedural changes" (R. 473). But in coming to this conclusion the court below failed to recognize that the notice of the 1947 hearing thereon opened the entire question of co-operative payments, and that the testimony therefore related to the whole subject. 11 F.R. 640, 643-644. Although some of the proposals in the notice of hearing on the 1947 amendments related to changes in the rates of payment, one of the proposals was to reconsider, in all respects, "the basis for the payments as well as the need for such payments and their effectiveness." 11 F.R. 640, 643-644. The issues created by these proposals were thoroughly canvassed at the public hearing, and the evidence with respect to these amendments is set forth in 472 pages of testimony and 33 exhibits.<sup>3</sup>

The principal changes in the order as a result of the 1947 hearing were a reduction in the rate of co-operative payments and a modification in the conditions for payment.<sup>4</sup> The Secretary also re-

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<sup>3</sup> The transcript of the record of this hearing is a public record in the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D. C., and is identified as Docket No. AO-14-A12; the evidence with respect to co-operative payments is found in pages 1621-2093.

<sup>4</sup> Some of the relevant provisions in the 1941 order and the 1947 order are as follows:

<i>Provisions of 1941 order:</i>	<i>Substituted provisions of 1947 order:</i>
(1) Any such cooperative association shall receive an amount computed at not more	(1) Each qualified association shall be entitled to pay-

affirmed his prior findings with respect to the order except "insofar as such findings may be in conflict with the findings set forth herein." 12 F.R. 4921. It is immaterial whether these changes be characterized as minor or major, as procedural or substantive. Since the order now in effect rests on—indeed remains in effect because of—the evidence adduced in 1947, it cannot be challenged on evidentiary grounds, without reference to that evidence and a showing of its insufficiency.

In any event, there is no basis for the view that the 1947 amendments to the order provided for

than the rate of  $1\frac{1}{2}$  cents per hundredweight of milk marketed by it on behalf of its members in conformity with the provision of this order, the value of which is determined pursuant to § 904.7 (a), and with respect to which a handler has made payments as required by § 904.8 (b) (3) and § 904.10: *Provided*, That the amount paid shall not exceed the amount which handlers are obligated to deduct from payments to members under paragraph (e) hereof and are not used in paying patronage dividends or other payments to members with respect to milk delivered except in fulfilling the guarantee of payments to producers; and that in cases where two or more associations participate in the marketing of the same milk, payment under this paragraph shall be available only to the association which the indi-

ment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to § 904.9 (b) (2) and § 904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (e) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to this subparagraph shall be at such lower rate. [7 CFR 1947 Supp. 904-10(b) (1).]

\*slight procedural changes. The procedural steps to be observed by co-operatives in applying for payments were not changed by the amendments in 1947. The changes set forth in the 1947 amendments were substantive rather than procedural and, as we have seen, the hearing went to the roots of the present problem. The Secretary found, on the basis of the extensive hearing record with respect *inter alia* to whether co-operative payments should be continued in effect, that each provision in the order, as further amended in 1947, will tend to effectuate the declared policy of the Act, and the Secretary ratified and affirmed the former findings as to co-operative payments.

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vidual producer has made his exclusive agent in the marketing of such milk. [7 CFR 1941 Supp. 904.9(a)(1).]

(2) Any such cooperative association shall receive an amount computed at the rate of 5 cents per hundredweight on Class I milk received from producers at a plant operated under the exclusive control of member producers, which is sold to proprietary handlers. This amount shall not be received on milk sold to stores, to handlers, in which the cooperative has any ownership, or to a handler with which the cooperative has such sales arrangements that its milk not sold as Class I milk to such handler is not available for sale as Class I milk to other handlers. [7 CFR 1941 Supp. 904.9(a)(2).]

(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association. [7 CFR 1947 Supp. 904.10(b)(2).]

In the absence of the evidence on which the findings and the provisions in the order are based, the Court assumes the existence of sufficient evidence to support the action by the Secretary. *Niagara Hudson Corp. v. Leventritt*, 340 U.S. 336, 340. The findings of the Secretary on the basis of the evidence at a public hearing carry a presumption of the existence of a state of facts justifying the action. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567-568.

No question can arise, therefore, as to whether substantial evidence, on the record as a whole, supports the findings by the Secretary. Moreover, the complaint fails to raise the issue (R. 1-7). The only issue is one of law as to whether, assuming the existence of facts which adequately support the Secretary's findings, the provisions in the order for payments to co-operatives, for performing market-wide services, are within the terms of the Act.

We do not mean to imply or concede, however, that the evidence at the 1941 hearing, which is in the record before the Court, would not provide adequate evidentiary support for the Secretary's findings. Indeed, we shall make reference to that evidence in showing the factual basis for the finding as to the need for payments to co-operatives for the performance of marketing services.

*The provisions in the order for co-operative payments are incidental to the classification, pricing, and pooling of milk under § 8c(5) of the Act and necessary to effectuate the provisions of the order as authorized by § 8c(7) of the Act.*

The Boston order provides for the payment to all producers and associations of producers delivering milk to handlers of a uniform price "for all milk so delivered" under § 8c(5) (B) (ii) of the Act, subject only to the variations or adjustments authorized in § 8c(5) (B). This section of the Act does not specify the method to be used in fixing the uniform price for milk.<sup>5</sup> The uniform price for milk is applicable only to milk that handlers are willing to buy from producers. In view of this circumscription of the program, auxiliary provisions are necessary, under § 8c(7) (D) of the Act, for cooperative payments for market services, and such provisions are "incidental" to the classification, pricing, and pooling of milk under § 8c(5) and "necessary" to effectuate the provisions of the regulatory program. In order to show that the payments to the co-operatives for market services are "incidental" and "necessary" within the meaning of § 8c(7) (D) of the Act, reference must be made

<sup>5</sup> The Act prohibits three types of provisions, but these sections of the statute are irrelevant in this case. See, § 8c(5) (G), § 8c(10), and § 8c(13) (B). Exceptions set forth in detail are not to be enlarged by implication. *Moore Ice Cream Co. v. Rose*, 289 U.S. 373.

to the nature of the milk industry and to the market services performed by the co-operatives.

1. *The significant factors of economic instability in the fluid milk market.*

The production of milk in June in the Boston milkshed is almost twice as much as in November (R. 229). In numerous marketing areas the milk production in May or June is from 50 percent to 100 percent greater than it is in November or December. Sommer, *Market Milk* (2d ed. 1946), p. 251. The demand for fluid milk, however, is relatively stable throughout the year. Also, some handlers keep on hand, or at least available, a supply somewhat in excess of their average daily demand for fluid milk. *Some Problems Involved in Establishing Milk Prices* (U.S. Department of Agriculture, September 1937), p. 55. This operating reserve may be distinguished from the far greater surplus which arises from the large seasonal increases in production in the spring and early summer. In recent years the Boston market has not been able to obtain enough milk from its milkshed to meet the market demand for fluid milk during the fall and winter months, although on "an annual basis, even, in recent years, the supply from the Boston milkshed has greatly exceeded the requirements for fluid milk." *Seasonality of Milk Deliveries in the Boston Milkshed* (U. S. Department of Agriculture, Bureau of Agricultural Economics, June 1949), p. 2. Also see, *Relative Prices*

*to Producers Under Selected Types of Milk Pools.* (Farm Credit Administration, June 1938), p. 22 *et seq.*; *The Surplus Problem in the Northeastern Milksheds* (Farm Credit Administration, April 1938), p. 36 *et seq.*

In order to avoid shortages during some of the time, it is necessary that the supply of milk should at all times exceed the minimum requirements of the fluid milk market. Whatever the minimum safety margin may be, it is not possible to maintain that minimum in the fall and winter months without exceeding it in the spring and summer months, owing to the seasonal variation in milk production. Milk is perishable and bulky, and cannot be satisfactorily stored for long periods of time. This economic imbalance in the production and marketing of milk has plagued the Boston market and some other metropolitan markets for a long time. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 549-550; *Nebbia v. New York*, 291 U.S. 502, 517-518; *H. P. Hood & Sons v. United States*, 307 U.S. 588, 593. "Under the best practicable adjustment of supply to demand the [fluid milk] industry must carry a surplus of about 20 per cent." *Nebbia v. New York*, 291 U.S. 502, 517. The surplus milk produced for, but not disposed of on, the fluid milk market is generally marketed—if marketed at all—in manufacturing outlets for milk products in competition with milk produced elsewhere for manufacturing purposes. But to produce and handle milk in accordance with the many precautions required by

the health authorities for milk marketed as fluid milk is far more expensive than to produce milk just for manufacturing purposes. See, Sommer, *Market Milk* (2d ed. 1946), pp. 100-243, 295-441. In view of the competition, however, surplus milk produced for the fluid milk market but disposed of to manufacturers must be sold at a price substantially lower than the price received on the fluid milk market. This basic difficulty has been widely recognized in milk marketing areas.<sup>6</sup>

The entire supply of milk approved by the health authorities for use as fluid milk in the Boston marketing area is fungible or homogeneous. There is no discernible basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid milk market, nor can one producer's milk be distinguished from that

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<sup>6</sup> See, Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 182-240; Lininger, *Dairy Products Under the Agricultural Adjustment Act* (The Brookings Institution, 1934), p. 3 *et seq.* The basic problem exists also in Canada. The *Report of the Ontario Royal Commission on Milk* (by Honorable Dalton C. Wells, a Justice of the Supreme Court of Ontario), p. 60, states that

It costs him [the producer] as much to produce and transport [the surplus milk] as the milk he sells at the standard fluid milk price, and if the market for fluid milk cannot absorb it he must sell it, if possible, as surplus milk. If he is not able to sell it, it is a dead loss apart from the use to which he can put it on his own farm. If he can sell it, he sells it at what is known as the secondary price which . . . is . . . less than the prevailing price for fluid milk consumed as such.

The same marketing condition prevails in England also. See, *Milk Report of Reorganization Commission for Great Britain* (Ministry of Agriculture and Fisheries, Economic Series No. 44), pp. 6-117.

of another. All of the milk approved by the health authorities for fluid use is equally available for the fluid milk market. A serious problem, therefore, exists as to assuring an adequate supply of fluid milk throughout the year and of equitably disposing of the surplus milk. Under such conditions, the declared purpose of the Act is not attained by merely classifying, pricing, and pooling milk that handlers are willing to buy from producers; the "exquisitely complicated" problems of milk marketing can be solved in the public interest only by additional or auxiliary provisions in the Boston order for co-operative payments for market services which will aid in coping with these fundamental difficulties.

2. *The market services performed by the co-operatives are "incidental" and "necessary."*

(a) *Maintaining adequate supply of fluid milk and disposing of surplus.*

An important market-wide service performed by the co-operatives consists, in the language of the court below (R. 484), of maintaining "an adequate market supply of fluid milk, particularly in the short production season, and disposition of the surplus supply at all times and particularly in the fruitful season" (R. 484). The court significantly continued (*ibid.*):

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<sup>1</sup> The quotation is from *Queensboro Farms Products v. Wickard*, 137 F. 2d 969, 974 (C.A. 2).

There is no doubt that these services are pronounced aids to all participants in the marketing area—producers, handlers and consumers. This is so clear that it serves no purpose to describe the helpful effects in detail.

This concession that the services are beneficial to all producers, not merely the members of the co-operatives, was required by the factual material in the record. The co-operative associations of producers that operate milk plants provide facilities that make possible the maintenance of supplies for the market under conditions of seasonably fluctuating production (R. 175-176, 180-183, 213-217). The co-operatives handle a proportionately larger share of surplus milk than the proprietary handlers (R. 228, 230a), and in doing so the co-operatives make a substantial contribution to the solution of the market needs in the months of surplus production and in the period of short production.

The proprietary handlers in the Boston area, of course, receive some surplus milk, but in the Boston market the proprietary handlers are generally specialized as to the range of handling operations which they perform, and even those handlers which own and operate milk plants are primarily engaged in supplying their own Class I needs for profit and are not normally interested in maintaining a reserve supply of milk for competing handlers (R. 23, 69, 83, 214). A proprietary handler prefers not to buy milk from another proprietary

handler "because he does not wish his customers to know that his supply came from a competitor" (R. 69). Proprietary handlers prefer to buy their milk from producers or co-operatives (R. 23, 69). Some proprietary handlers limit their activity to the distribution of bottled fluid milk, and buy from co-operative associations of producers the milk which they need. These handlers thereby avoid, during the spring and summer months, handling or processing any of the surplus milk. Some handlers buy direct from producers but not up to the point where they would be required to find an outlet on the market or in manufacturing plants for any of the surplus milk during the spring and summer months (R. 67-68, 214). A few proprietary handlers engage in processing part of the market surplus in addition to distributing fluid milk. But the co-operative associations of producers are compelled to handle a proportionately larger share of surplus milk than proprietary handlers (R. 180-183), and in doing so the co-operative associations incur losses in the performance of this market service (R. 183-185). This is a service that contributes to the solution of the problem of handling the surplus milk. See, *Cooperative Marketing of Dairy Products* (Farm Credit Administration, June 1939), pp. 10-13.

The co-operative associations serve to maintain the fluid milk supply for many of the proprietary handlers. That is made clear by the data in evi-

dence at the original hearing that the sales of Class I milk in 1939 by co-operatives to proprietary handlers ranged from 6,039,000 pounds to 55 handlers in June to 12,853,000 pounds to 104 handlers in November (R. 230a). The volume of milk sold by the co-operatives as Class I milk to proprietary handlers was approximately 13 percent of the total utilization of Class I milk in the market for the month of June, while in November the co-operative sales of Class I milk approximated 28 percent of the total utilization of Class I milk for that month.<sup>8</sup> The necessary result is that the co-operatives are left with a large surplus in the spring and summer months. These proprietary handlers have thus in effect transferred all or substantially all of the necessary surplus handling operations to the cooperatives (R. 67-68, 82, 214).

This is also of significance with regard to the operation of manufacturing plants for milk products. A plant manufacturing milk products of the type in which the surplus milk is disposed of in the Boston market must handle a relatively large

<sup>8</sup> These percentages are derived by dividing the figures for total sales of Class I milk sold by co-operatives to proprietary handlers in June and November, shown in Government Exhibit No. 6 (R. 230) by the figures for total Class I utilization in the market for the respective months, reflected in Government Exhibit No. 2, Table 30. (R. 228). The figures for total Class I utilization in the market for June and November are shown in Exhibit No. 2, Table 30, as average daily Class I utilization as reported by handlers representing 95 percent of all regulated milk in the market. To obtain figures for total Class I utilization for these months for 100 percent of the market, the daily average figures are divided by .95 and multiplied by the number of days in the respective months.

volume of milk if the various products are to be processed at low unit costs and the plant operated efficiently. With respect to the small proprietary handlers, the relatively small volume of surplus milk which they would have for manufacturing purposes, if they received the total production of milk from their group of producers during the entire year, would result in relatively inefficient manufacturing operations. Therefore, these handlers avoid or reduce inefficiencies in their own operations by minimizing their direct receipts from producers, and they rely upon purchases from the co-operatives to make up the balance of their requirements in the fall and winter months of low production. Some co-operatives, in order to handle surplus milk, operate milk plants, even though such market service is often at a financial loss (R. 65-68, 180-183).

The producers in the normal production area whose milk is required for the fluid milk market in the winter months of short production constitute the permanent productive force in the market, and whenever these producers have surplus milk it must be utilized in some outlet if an adequate annual supply for the market is to be maintained in the public interest.<sup>9</sup> For if they cannot dispose

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<sup>9</sup> At the end of the war, there was some decrease in the problem of finding an outlet for the surplus milk, *infra*, pp. 72-73. But the serious need for stimulating greater production in the winter months required vigilance in taking care of the seasonal surplus, well as the usual operating reserve, in an efficient and satisfactory manner that would

of their surplus in the flush season, they are likely to reduce their herds so as to avoid the necessity for wastefully dumping a part of their product. Black, *The Dairy Industry and the AAA* (Brookings Institution, 1935) p. 156. Manufacturing facilities must therefore be available to handle the milk that cannot be utilized on the fluid milk market (R. 213-214). These co-operatives that provide the plants and facilities must often assume considerable expense in the performance of services that require business skill and managerial capacity. The plants and the manufacturing facilities required to handle the surplus milk are not ordinarily required at other times of the year, and such plants may be idle as much as 85 percent of the time (R. 69). But the plants are maintained as standby facilities, and as such the plants represent outlays of capital in excess of the capital costs of other operators who assume no part of the burden of surplus disposal (R. 183-184). In addition, operating costs by the co-operatives under these conditions are greater than normal (R. 68-69). The co-operatives must seek wholesale or retail markets for the milk products, and since these dairy products are the by-products of seasonal aberrations, the products must be put on the market irregu-

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maximize returns to producers and bring about orderly marketing so as to encourage greater production in the short season. This "serious need for encouraging a shift toward more fall production" and the use of a variety of "safeguards" in this respect are set forth in the Secretary's decision of June 30, 1947, with respect to amendments to the Boston order. 12 F.R. 4402 *et seq.*

larly, and the co-operatives are at a competitive disadvantage in disposing of the products produced from the surplus milk.

The co-operatives "are able to keep in touch with the supply situation and divert milk to its most economical uses better than any other market agency." *Cooperative Marketing of Dairy Products* (Farm Credit Administration, June 1939), p. 8. This is an important service in dealing with the problems of surplus milk in the spring and summer months and insuring an adequate supply of milk during the winter months (R. 216). The mere classifying, pricing, and pooling of milk is not enough, because milk for which a producer can find no market is not classified, priced, or pooled; the order is applicable only to milk that handlers are willing to buy from producers. These co-operatives that supply fluid milk to proprietary handlers, on demand, channel milk from the initial receipt from producers to the ultimate use in the highest value class in the form which makes it available to consumers as fluid milk (R. 216). The co-operatives, in finding a market outlet for milk on the fluid milk market, maximize the uniform blended price to all producers (R. 215, 232); and also fluid milk distributors are thus able to obtain milk on short notice to meet the maximum Class I demands, and the statutory purpose is achieved of insuring an adequate supply of milk throughout the year. By insuring to each producer an outlet

for all of his milk throughout the year and by insuring to handlers a volume of milk sufficient to supply their fluid milk needs, the co-operatives perform services "essential in stabilizing a market."<sup>10</sup>

In fixing the class prices authorized by § 8c(5) (A) of the Act, consideration must be given to the possibilities for disposing of the surplus milk, *i.e.*, Class II milk. If a substantial percentage of the surplus milk is to be dumped for lack of any outlet, the class prices under the order may be substantially different from the class prices in the event of the existence of an outlet for the surplus milk. The

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<sup>10</sup> Bartlett, *Cooperation in Marketing Dairy Products*, p. 23. See, also, *Id.* at pp. 21, 22, 161; and McKay and Lane, *Practical Cooperative Marketing* (1928), pp. 122, 123. For a discussion of the market-wide services of a large co-operative, in a metropolitan market, see, *e.g.*, McKay and Lane, *Practical Cooperative Marketing* (1928), pp. 141-148. Although co-operative associations of producers made much progress in their effort to bring about orderly marketing of milk, the co-operatives lacked "the bases for an adequate control" and were unable, over a substantial period of time, to maintain orderly marketing conditions. *Economic Bases for the Agricultural Adjustment Act* (U. S. Department of Agriculture, December 1933), pp. 42-43. The public interest in bringing about the orderly marketing of milk was so pronounced that the legislatures of many states enacted measures for the regulation of milk marketing, but these statutes were not properly effective in the metropolitan markets that receive milk in interstate commerce (see, *e.g.*, *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, 521, 526), and Congressional legislation was necessary under the commerce clause of the Constitution. See, Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), p. 227; and Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 311, 313. The cooperatives continue, however, to perform an essential function, under these regulatory programs, in bringing about the orderly marketing of milk.

order is applicable only to milk that handlers are willing to buy from producers; and the order has no applicability to milk that a producer dumps for lack of an outlet. To hold that the market services by the co-operatives that receive these payments in connection with the disposition of surplus milk are not "incidental" to the classification, pricing, or pooling of milk is to fail to recognize compelling and irrefutable facts. The order provides in § 904.10(b) for two rates of payments to co-operatives<sup>11</sup>, and the requirement for the higher rate is that the co-operative assume responsibility for operating a milk plant to maintain a reserve of milk to meet the irregular needs of the market (9 F.R. 3059), and in some instances the use of such milk in the manufacturing of milk products

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<sup>11</sup> The New York order also provides for different rates of payment to the co-operatives (7 CFR 927.9(f)). The highest payment under the New York order is to the operating co-operatives, and under certain circumstances the payment is made to a co-operative only if it has "sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members." Any co-operative who receives any payment must arrange for and supply "in times of short supply, Class I milk to the marketing area," and must secure "utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers" (7 CFR 927.9(f)). Under the New York order—as under the Boston order—a co-operative can receive no payment unless the Secretary has made a determination that the respective co-operative is performing market services that entitle it to the payment (7 CFR 927.9(f)). The Market Administrator maintains close supervision over the co-operatives with regard to these "payments, and payments are suspended whenever there is reason to believe" that the co-operative is not performing the services (7 CFR 927.9(f)).

(R. 81-82). The market services by the co-operatives have an immediate relationship to the classification, pricing, and pooling of milk and are auxiliary to those provisions. In determining the Class II price, which applies to surplus milk, the costs of handling the surplus milk and the returns from its sale must be considered if adequate market outlets are to be maintained for surplus milk under the order.

When the order was amended in 1941 so as to provide for the market services by the co-operatives, another amendment was also included to reduce the basic handling allowance on Class II or surplus milk (R. 73-74, 89). Prior to these amendments in 1941 the order had provided in the Class II formula for an allowance of 26 cents per hundredweight to defray the cost of handling surplus milk. But in view of the payments for market services by the co-operatives it was decided by the Secretary, on the basis of the evidence in the hearing record, that the handling allowance on Class II or surplus milk should be reduced. "The two amendments were considered together and depended upon each other," and the change in the Class II price was made in specific contemplation of one of the effects which it was anticipated would flow from the co-operative payment provisions (R. 89). The price change and the effect of the co-operative payment provision were designed to provide properly for an outlet for milk

at Class I and Class II prices. These facts serve to demonstrate that the co-operative services are "incidental" to the classification, pricing, and pooling of milk, and are necessary in order to make effective the pricing provisions in the order.

(b) *Other co-operative services beneficial to all producers.*

Various other services, beneficial to all producers, members of co-operatives and non-members alike, are also performed by the co-operatives—both the co-operatives that operate plants and receive the higher rate of payment and also the co-operatives that do not operate plants and therefore receive the lower rate of payment. The effective operation of a plan or program of regulation for the Boston milk market requires constant attention with respect to an extensive and mutable set of conditions. Price fixing, under a milk order, is not static; it is a continuing process.<sup>12</sup> If the program is to be effective, the producers in the industry should discern and analyze the facts relative to current economic conditions, and bring

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<sup>12</sup> The Secretary, in seeking the economic goal set forth in the statute, must consider attributes that "are extremely intangible, such as different types of economic situations, broad objectives that must be definitized to meet concrete situations, different methods of control, technical methods and procedures and a variety of relationships." Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H.R. 4236, H.R. 6198, and H.R. 6324, 76th Cong., 1st Sess. (1939), p. 161. Economic controls are difficult in view of the complex and changeable factors in milk marketing. *Hood & Sons v. DuMond*, 336 U.S. 525, 529.

those conditions to the attention of the Secretary at public hearings on proposed amendments to the order. The administrative official in charge of the Dairy Branch stated that "but for the efforts of the co-operatives there would have been no Boston order, and equally there is no doubt that as the result of the order and amendments thereto prices to producers and marketing conditions have been greatly improved" (R. 81). Co-operative associations of producers, including those whose activities consist chiefly of bargaining with respect to the sale of milk (bargaining co-operatives), as well as those that operate milk plants (operating co-operatives), now employ trained economists to give attention to the needs of the dairy industry in that market (R. 63-64), and this activity has been of much value to the market in the effective operation of the plan or program for milk marketing in this area.<sup>13</sup>

The analytical work by the co-operatives has furnished the impetus, in many instances, for the calling of public hearings to consider amendments

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<sup>13</sup> Without a strong co-operative in a milk market "the cornerstone for a successful program is lacking." *Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation* (1939), p. 31. "It would be impossible to have the type of regulatory program which exists today without strong co-operative organizations." *Id.* at pp. 33 and 35. See, also, Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 467-478; Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), pp. 267-268.

to the order (R. 236). It is not to be expected that an individual producer, with his limited means, would be able to represent himself or to submit relevant evidence in a comprehensive way with respect to amendments that are needed in the light of new conditions in the Boston market. But the co-operatives are constantly engaged in formulating data and in otherwise preparing for public hearings that are held from time to time on proposed amendments to the program. For example, two economists on the staffs of qualified co-operatives served as members of the Boston Milkshed Price Committee, appointed in 1947 by the Market Administrator to make an intensive study of how best to establish Class I prices in the Boston market.<sup>14</sup> The Committee was given a full opportunity to report to the dairy industry and to the general public on its studies, conclusions, and recommendations. See, *A Recommended Basis of Pricing Class I Milk in the Boston Market* (Boston Milkshed Price Committee, September 1947), pp. 1-58. The "serious seasonal supply problem" was a major factor in the Committee's consideration of a formula for Class I milk. *Id.*, at p. 29. The price formula which the Committee recommended for Class I milk was subsequently included, with

<sup>14</sup> Dr. John D. Black of Harvard University, Dr. George F. Dow of the New England Research Council on Marketing and Food Supply, and Dr. Thurston M. Adams of the University of Vermont served on the committee along with an economist from the office of the Market Administrator, economists representing the handlers, and two economists on the staffs of the qualified co-operatives.

some modifications, in amendments to the order on the basis of a public hearing at which seven of the members of the Committee testified in support of the adoption of the formula. 13 F.R. 1520. This "is a good example of how dairy farmers, through their marketing cooperatives, can work with each other and with the Government in developing a milk price policy that gives both producer interest and public interest equal billing." *News for Farmer Co-operatives* (Farm Credit Administration, April 1948), p. 11. In addition to the work of the economists from the staffs of the qualified co-operatives in serving on the Committee, probably "a greater contribution was their leadership in gaining essential producer approval of the new plan for pricing milk." *Id.*, at p. 16. Producer approval is required by § 8c(8) and (9) of the Act for an order or an amendment to an order to be made effective by the Secretary, and "the regulatory program must gain and hold the confidence of producers to be successful." *Id.*, at p. 17.

Market conditions are so changeable with respect to the wide variety of factors affecting the classification, pricing, and pooling of milk that the qualified co-operatives must give constant attention to these matters. This basic need was stressed in the report of the Boston Milkshed Price Committee by the conclusion that the formula it was recommending "will need to be critically examined from time to time in order to establish whether any basic changes in demand or in production techniques

require that an adjustment be made in the economic relationships underlying the formula," and such fundamental changes "take place frequently."

*A Recommended Basis of Pricing Class I Milk in the Boston Market* (Boston Milkshed Price Committee, September 1947), p. 58.

The co-operatives which qualify for these payments are required by the order (Appendix B, *infra*, p. 103) to maintain "a competent staff for dealing with marketing problems," and to collaborate with similar associations in maintaining and strengthening the operation of the regulatory plan for the handling of milk. § 904.10(a)(5) and (7). No payment is made to a co-operative unless the Secretary determines that the applicant is qualified to receive the payments. § 904.10(a) and (b). Each co-operative that receives payments must submit such reports as may be requested by the Market Administrator with respect to "its use of co-operative payments and its performance in meeting the requirements set forth as to the basis for such payments." § 904.10(c). The order also provides (§ 904.10(d)) that whenever there "is reason to believe" that a co-operative is no longer entitled to receive the payments the Market Administrator, on request by the Secretary, shall suspend the payments until a decision is made by the Secretary, after notice and opportunity for a hearing, relative to whether the co-operative is rendering the market services. Although these provisions became effective on August 1, 1941, it

was not until November 22, 1941, that the first approval was given with respect to payments to co-operatives, and at that time 10 were qualified and four disqualified (R. 88-89).<sup>15</sup> In the administration of this order, payments to some co-operatives have been suspended on the basis of information received by the Secretary (R. 89).

- (c) *The provisions for payments for marketing services are, as a matter of law, within the statutory standards of "incidental" and "necessary."*

There is no issue in this case as to whether the co-operatives perform the services described in the preceding pages of this brief. The opinion below recognizes not only that such services are performed, but also that some of the services at least are of value to the market as a whole. No question arises as to whether substantial evidence, on the record as a whole, supports the findings by the Secretary (*supra*, pp. 20-25). The only issue is one of law as to whether, assuming there is adequate evidence to support the findings by the Secretary, the provisions in the order for payment to the co-operatives that perform the market-wide services are within the terms of the Act.

The opinion below stated that under the "harsh" standard of necessity the provisions in the order cannot, as a matter of law, be regarded as "neces-

<sup>15</sup> This information is set forth in an affidavit filed in support of the Government's motion for summary judgment (R. 88-89).

sary" (R. 485). This opinion of the lower court gives an unwarranted rigidity, in this respect, to the application of the word "necessary", which has always been recognized as a word to be "harmonized with its context". *Armour & Co. v. Wantock*, 323 U.S. 126, 129-130. In a remedial statute, the word "necessary" does not mean indispensable, essential, or vital. *Armour & Co. v. Wantock*, 323 U.S. 128, 129-132; *Borden Co. v. Borella*, 325 U.S. 679, 682-684; *Roland Co. v. Walling*, 326 U.S. 657, 664. The authorization in the Act to include incidental and necessary provisions in a milk order must include such provisions as are reasonably suitable for carrying into execution the powers expressly granted. Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 413-414, in which it was stated that "necessary \* \* \* frequently imports no more than that one thing is convenient, or useful, or essential to another," and to "employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." Even if alternatives could be substituted for co-operative payments, it is enough that the provisions in the order are needed in attaining the declared purpose of the Act, and that the omission of the provisions would handicap the achievement of the Congressional purpose. *Roland Co. v. Walling*, 326 U.S. 657, 664.

The statutory authorization, for incidental and

necessary provisions in a milk order, requires a continuous process of application; it cannot be reduced to formula, for relevancy and necessity are matters that are variable in relation to the many unstable and changeable situations within the purpose and scope of the regulatory program.<sup>16</sup> The

<sup>16</sup> The Secretary has included in milk orders many provisions which are incidental to the classification, pricing, and pooling of milk and are necessary to effectuate the provisions of the orders. These provisions in milk orders are too numerous for summarization in brief compass, but some examples are: The Cleveland order provides (7 CFR 975.11(b)) for the payment of interest on overdue accounts, and a similar provision is included in various other orders. The Philadelphia order provides (7 CFR 1950 Supp. 961.12) for the termination of obligations under the order after a certain period of time, and a similar provision is included in 40 other orders. The St. Louis order provides (7 CFR 1950 Supp. 903.4(c)) that in establishing the classification of milk the burden rests upon the handler to prove to the Market Administrator the class utilization of such milk, and if the requisite proof is not submitted the milk is classified as Class I. This type of provision was held valid in *United States v. Ridgeland Creamery Co.*, 47 F. Supp. 145, 149 (W.D. Wis.); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 225 (E.D. Mo.), affirmed *sub nom. Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87 (C.A. 8). A provision with respect to the burden of proof, similar to the provision in the St. Louis order, is included in 40 other orders. The New Orleans milk order provides (7 CFR 942.3(d)) that a handler shall keep adequate records of receipts and utilizations of milk and, during the usual hours of business, shall make available to the Market Administrator such records and facilities as will enable the Market Administrator to verify the receipts and utilization of milk and verify payments to producers. A similar provision is included in all other milk orders. Although §8(d) of the Act requires the submission of information, under some circumstances, the record keeping requirements in the orders are based on § 8c(7)(D) of the Act. The Louisville milk order provides (7 CFR 1950 Supp. 946.7(b)(3) and 7 CFR 946.8(d)(2)) that seasonality payments shall be deducted in April, May, and June of each year and then paid to producers in September, October, and November in order to serve as an incentive to minimize seasonality of production. The original New York order provided (7 CFR 1938 Supp. 927.8(f)) for market service payments to handlers for diverting surplus

words "incidental" and "necessary" do not have, as a matter of law, a definite and circumscribed meaning so that their application, irrespective of the facts, is to be ascertained *in vacuo*. The Congress recognized that a rigid and inflexible method of regulation cannot be applied effectively to the changeable situations in the various milk marketing areas. "The intricate problems of the milk industry as described in the above cited opinion [*Nebbia v. New York*, 291 U.S. 502], explain the use of the several pooling and price plans authorized for inclusion in milk orders," and their "*effectiveness depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions*" [Emphasis supplied]. Sen. Rep. No. 565, 75th Cong., 1st Sess. (1937), p. 3. See also, H. Rep. No. 468, 75th Cong., 1st Sess. (1937), p. 3. Congress could not foresee every contingency in this field in which "the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult."<sup>17</sup>

The "terms of the Order are largely matters of administrative discretion" and the technical de-

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milk to manufacturing plants. The deductions for payments to handlers, under the New York order, were made in exactly the same way in computing the uniform price, under § 8c(5) (B) of the Act, that deductions are made for co-operative payments. The provisions for payments to handlers were described and applied in *Grandview Dairy v. Jones*, 157 F. 2d 5, 6, (C.A. 2), certiorari denied, 329 U. S. 787.

<sup>17</sup> The quotation is from *Hood & Sons v. DuMond*, 336 U.S. 525, 529.

tails "are left to the Secretary and his aides." *Stark v. Wickard*, 321 U.S. 288, 310. In reviewing the provisions of the Act and sustaining its constitutionality, it was stated in *United States v. Rock Royal Co-op.*, 307 U.S. 533, 576, that § 8c (7)(D) of the Act authorizes the inclusion in a milk order of "provisions auxiliary to those definitely specified." The Congress was not seeking to solve the variant economic problems in the field of milk marketing by solutions rigidly limited to a code of specifics. *Queensboro Farms Products v. Wickard*, 137 F. 2d 969, 974 (C.A. 2); *Waddington Milk Company v. Wickard*, 140 F. 2d 97, 100 (C.A. 2); *Bailey Farm Dairy Company v. Anderson*, 157 F. 2d 87, 94 (C.A. 8), certiorari denied, 329 U.S. 788; *Dairymen's League Cooperative Ass'n. v. Brannan*, 173 F. 2d 57 (C.A. 2), certiorari denied, 338 U.S. 825. Statutory provisions in general terms are not mechanical or self-defining standards. *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 611. Wide discretion is vested in the Secretary to include, on the basis of evidence adduced at a public hearing, provisions that are found by him to be incidental and necessary in order to attain the legislative goal.<sup>18</sup>

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<sup>18</sup> It is generally recognized that in providing for the regulation of milk marketing, latitude must be allowed for the inclusion of auxiliary provisions. See, e. g., *Agricultural Marketing Act*, 1931, 21 and 22 Geo. 5, C. 42 § 6, Vol. 1, Halsbury's *Statutes of England* (2d ed., p. 243), in which it is provided that regulations may include, in addition to provisions expressly authorized, "such matters as are incidental to or consequential on the provisions of this Act."

The responsibility of selecting the means of achieving the statutory policy and the relation of the remedy to policy are peculiarly matters for administrative competence. *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90, 112. Moreover, the remedy selected by the Secretary in this instance is in accord with the requirement of § 10(b)(1) of the Act that the provisions of a milk order shall "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution."<sup>19</sup>

<sup>19</sup> There can be no question that different treatment and special considerations have been accorded to marketing co-operatives by State and Congressional legislation alike; and that the "distinctions between such co-operatives and business organizations have repeatedly been held to justify different treatment." *United States v. Rock Royal Co-op.*, 307 U.S. 533, 562-565. Numerous acts of Congress deal with co-operatives differently from proprietary business enterprises, and enunciate the policy of aiding and encouraging the establishment, operation, and growth of marketing co-operatives. Some of the instances of the Congressional policy of special consideration for, and treatment of, co-operatives are in the Agricultural Marketing Act of June 15, 1929, 46 Stat. 11, 12 U.S.C. 1141, 1141(j); the Clayton Act, 38 Stat. 730, 15 U.S.C. 17; the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291; the Robinson-Patman Act of June 19, 1936, 49 Stat. 1528, 15 U.S.C. 13b; and the Grain Futures Act, 42 Stat. 998, as amended and redesignated as the Commodity Exchange Act, 49 Stat. 1491, 7 U.S.C. 10a. See, also, Nourse, *The Legal Status of Agricultural Cooperation*, pp. 241-266; and Hulbert, *Legal Phases of Co-operative Associations* (Farm Credit Administration, May 1942), pp. 307-322. These declarations of Congressional policy with respect to co-operatives preclude any argument that the provisions in the Act are to be given a restrictive con-

Provisions in a milk order that are found by the Secretary, on the basis of the hearing record, to be incidental and necessary, under § 8c(7)(D) of the Act, are to be tested by whether the finding has warrant in the evidence. *Unemployment Commission v. Aragon*, 329 U.S. 143, 153-154; *Securities and Exchange Commission v. Central-Illinois Corp.*, 338 U.S. 96, 126. No issue is presented in this case as to whether substantial evidence supports the findings of the Secretary. Moreover, the hearing record on which is based the present provisions of the order is not before the Court, *supra*, pp. 20-25.

We have shown that as a matter of fact the services performed by the co-operatives are of substantial value in the administration of the statutory program in the public interest for the orderly and efficient marketing of milk, and that since these services are of benefit to all producers in the market, it is reasonable for all producers to share in paying for the services. Certainly it cannot be said in these circumstances that, as a matter of law, the payments to the co-operatives for performing the market services are not incidental to the classification, pricing, and pooling of milk or necessary to effectuate the provisions of the order.

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struction so as to prohibit, as a matter of law, the inclusion of provisions with respect to co-operative payments for market services.

C. *The provisions in the order for co-operative payments are "not inconsistent" with § 8c (5) of the Act.*

The authorization for incidental and necessary provisions under § 8c(7)(D) of the statute does not include provisions which are "inconsistent with" the terms and conditions specified in § 8c(5) of the Act. The court below held that a payment to cooperatives, as provided for in the order, "is opposed to the express requirement of uniform prices to producers subject only to the deductions and differentials set out in the Act" (R. 485). We shall show that there is no departure from the requirement for uniform prices for milk, and also that there is no inconsistency with the provisions of § 8c(5) of the Act.

1. *Co-operative payments for market services are consonant with uniform prices for milk under § 8c(5) of the Act.*

(a) *Payments for services are not payments for milk.*

In holding that the payments to cooperatives violated the statutory requirement of uniform prices to producers, the court below failed to distinguish between the uniform price paid for milk and the co-operative payment for "performing certain marketing services." The provision for uniform prices is "for all milk so delivered." The cooperatives and their members receive, under the

terms of the order, the same amount *for their milk* as anyone else. The cooperative payments are not made for milk sold or delivered; the payments are as reimbursement, in part at least, for the expenses incurred in the performance of market services. The Secretary found in the issuance of the original order for cooperative payments that the payments are for "performing certain marketing services" that *inter alia* are necessary to effectuate the order, *infra*, Appendix B, pp. 95-96. This finding by the Secretary, with respect to the original provisions for cooperative payments, was ratified and affirmed in the issuance of the amended order now in effect, *infra*, Appendix B, pp. 95-96. Indeed the Court of Appeals recognized that these market-wide services by the cooperatives which qualify for and receive payments are beneficial to the entire market (R. 484), quoted *supra*, p. 31.

Since the payments to cooperatives are for the performance of market services, there is no basis for saying that such payments violate the statutory requirement in § 8c(5)(B) for the payment of a uniform price for milk. A payment for market services is not a payment for milk. Moreover, the payments are not to the cooperatives' members, but to the cooperate entities as reimbursement, in part at least, for expenses incurred in the performance of market-wide services.

(b) *Cooperative Payments are not Adjustments or Variations in the Uniform Price.*

Respondents also contend that payment to cooperatives for market services is a variation or adjustment in the payment of the uniform price for milk, and that since it is not one of the adjustments specified in § 8c(5)(B), it is inconsistent with the statute. This is just another way of stating the issue discussed in the immediately preceding section of this brief, and the answer is that paying cooperatives for services rendered does not constitute a variation in paying the uniform price for milk.

The terms of the Boston order also show that the uniform price for milk is paid without any variation insofar as cooperative payments are concerned, § 904.8, *infra*, Appendix B, pp. 97-98. In brief compass the computation is in this manner: The Market Administrator computes the value of milk for each handler by multiplying the quantities used by each handler in each class by the class price and by adding the results. Then the values for all handlers are combined into one total. That total is increased or decreased by several necessary additions or subtractions, including a subtraction of the payments to cooperative associations of producers for market-wide services. The resulting total is then divided by the total quantity of milk, and the result thus obtained is the basic or uniform price. See, § 904.8(b) of the order, *infra*, Appen-

dix B, pp. 97-98. That uniform price is paid for milk subject only to the variations or adjustments enumerated in the Act, *e.g.*, a variation or adjustment for butterfat under § 904.9(d) of the order. But to the uniform price for milk there is no exception, variation, or adjustment in the Boston order for payments to co-operative associations of producers for the performance of market-wide services.

Numerous deductions from the producer-settlement fund have been necessary, in computing the uniform price, throughout the period of regulation under this legislation. The following section of this brief contains a summary of these provisions, *infra*, pp. 57-63. But payments that have been made as a result of these deductions from the producer-settlement fund were not payments for milk, and therefore were not adjustments to the uniform price under § 8c(5)(B)(ii) of the Act.

(c) *The deductions for cooperative payments are not inconsistent with the methods that may be used under § 8c(5) of the Act for computing the uniform price.*

The cooperative payments are deducted in the process of computing the uniform price in § 904.8(b) of the Boston order, *infra*, Appendix B, pp. 97-98. There is no provision in § 8c(5) of the Act that precludes the use of the method in the Boston order for computing the uniform price. To be sure, the uniform price, under this method of com-

putation, does not pay to producers as much as the total class value of the milk that is regulated by the order. But there is no requirement in the Act that an order provide for class prices, and there is no requirement in the Act that the method of computing the uniform price result in the payment to producers of the aggregate value of the milk at class prices.<sup>20</sup>

The statute does not prescribe a rigid or inflexible method of computing prices under § 8c(5) of the Act. The words of the Act are of wide and comprehensive meaning. Any method may be used for fixing prices under § 8c(5)(A) of the Act, and § 8c(5)(B) is likewise without restriction as to the method of fixing the uniform price.<sup>21</sup> Moreover, a milk order may contain "one or more" of the terms or conditions set forth in § 8c(5) of the statute. In view of the different situations in the various milk marketing areas, there has been a wide variation in the methods used in milk orders

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<sup>20</sup> The Boston order does not require that the class prices be paid to producers. The requirement under the order as amended is that each handler shall pay the class prices in the manner provided for under the computation of the uniform price (7 CFR 904.7(a) and (b)). The uniform price is the price that must be paid to producers (7 CFR 904.9(b)). The uniform price is paid to producers "irrespective of the uses made of such milk by the individual handler to whom it is delivered," § 8c(5)(B)(ii). Hence, when an order is based on § 8c(5)(B)(ii) of the Act the class prices are not required to be paid to producers; it is the uniform price that must be paid to producers.

<sup>21</sup> The statute prohibits three types of provisions in milk orders. See, § 8c(5)(G), § 8c(10), and § 8c(13)(B). But these sections are not relevant in this case.

in fixing the prices. Some orders have set forth specific prices.<sup>22</sup> Generally, however, the orders have provided "methods for fixing" the prices. A simple method has been used whereby a differential is added to the prices paid for milk that is used to produce manufactured milk products, such as butter, cheese, powder, or evaporated milk.<sup>23</sup> In some orders the prices have been arrived at by means of a complex formula based upon changes in the index of wholesale commodity prices in the United States, an index of department store sales, and grain and farm labor costs.<sup>24</sup> The prices in some orders are based on a series of calculations relative to the wholesale commodity price index and the percentage that the total volume of milk in certain classes is of the total volume of receipts of milk from producers.<sup>25</sup>

Various additions and subtractions have been made in computing the class prices and also in computing the uniform price, and these provisions have never been regarded as improper steps in the method of arriving at the price that will attain

<sup>22</sup> See, e.g., § 965.6 of the Cincinnati milk order (7 CFR 1944 Supp. 965.6).

<sup>23</sup> See, e.g., § 903.4 of the St. Louis milk order (7 CFR 903.4) and § 941.5 of the Chicago milk order (7 CFR 941.5).

<sup>24</sup> See, e.g., § 904.7 of the Boston milk order (7 CFR 904.7). These provisions are analyzed and explained in the decision of the Secretary of Agriculture on March 18, 1948, 13 F.R. 1520 *et seq.* The Secretary's decision of April 22, 1949, also discusses changes with regard to the Class II price formula. 14 F.R. 2087 *et seq.*

<sup>25</sup> See, e.g., § 927.5 of the New York milk order (7 CFR 1950 Supp. 927.5).

the legislative goal. The provisions in milk orders for these additions and deductions constitute an essential part of classifying, pricing, and pooling milk, and are necessary to effectuate the provisions of the orders. Deductions have been made, in computing the uniform price under § 8c(5)(B)(ii) of the Act, for payments to handlers for market-wide services as well as deductions for payments to co-operatives for market-wide services. In the original New York order (7 CFR 1938 Supp. 927.8 (f)), provisions were included for diversion payments to handlers for market-wide services in diverting surplus milk from fluid milk plants to manufacturing plants. The deductions for diversion payments to handlers, under the New York order, were made in exactly the same way in computing the uniform price that deductions are made for co-operative payments. In *Grandview Dairy v. Jones*, 157 F. 2d 5, 6-7 (C.A. 2), certiorari denied, 329 U.S. 787, the provisions for diversion payments to handlers were described and applied, and the court stated that this deduction is such that the "uniform prices paid to producers are reduced as against the handlers to the extent of the aggregate amount of such allowance" for diversion payments.<sup>26</sup> The deduction for diversion pay-

<sup>26</sup> The diversion payments to handlers under the New York milk order totaled approximately \$13,000,000. *New York Market Administrator's Bulletin*, Vol. 3, No. 7, pp. 8-9. During the early part of the war the need for these services became less pronounced, and the order was amended (7 F.R. 9109) so as to eliminate the provisions for diversion payments to han-

ments to handlers for market services, under the New York order, was an "unrecoverable charge against the producers."<sup>27</sup> But under the terms of the New York order the uniform price, computed under § 8c(5)(B) of the Act, was paid without any variation or adjustment for diversion payments—and in this respect also the uniform price is paid under the Boston order without any variation or adjustment for co-operative payments.

The necessity for latitude in making necessary subtractions in the computation of the uniform price is evident from inescapable examples. Each of the 33 milk orders for market-wide pools contains a provision for the establishment of a cash reserve. That subtraction—not referred to in the statute—is the last step in the process of computing the uniform price. See, *e.g.*, § 904.8(b)(7) of the Boston order, *infra*, Appendix B, pp. 97-98. The subtraction for the cash reserve is necessary to insure the solvency of the monthly pool. In the absence of a cash reserve, the failure of any handler to make full payment to the Market Administrator would result in the insolvency of the equalization or producer-settlement fund. In that situation the Market Administrator could not make full payment out of the fund, and the failure of a handler to

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dlers. But from September 1, 1938, to November 16, 1942, the performance of these services was a major factor in making effective the classification, pricing, and pooling provisions in the New York order.

<sup>27</sup> The quotation is from *Stark v. Wickard*, 321 U.S. 288, 301, as a description of the payments to co-operatives for market services.

receive full payment due from the fund would be regarded as relieving him from the obligation to pay producers at the uniform price under § 8c(5) (B) (ii) of the Act. In order to avoid this situation, all of the milk orders for market-wide pools contain provisions for the establishment of a cash reserve even though such a deduction in the computation of the uniform price is not expressly authorized by § 8c(5) of the Act.

There are other instances also in which it has been necessary for the Secretary to provide for subtractions in the computation of the price of milk. See, *e.g.*, the Lowell-Lawrence order (7 CFR 934.1 *et seq.*) in which prior to the amendment of October 1, 1950 (15 F.R. 6581) the composite price for the individual handler pool, under § 8c(5) (B) (i) of the Act, was obtained after a subtraction (7 CFR 934.9(b)(2)) for payments which a handler was required to make on milk that was also regulated under the Boston order, including administrative assessments. In the absence of this provision in the Lowell-Lawrence order, providing for certain subtractions with respect to milk that was also regulated by the Boston order, uniformity of prices for milk could not have been properly achieved.

Under the Louisville order (7 CFR 946.7(b)(3)), a deduction for seasonality payments is made in the computation of the uniform price under § 8c(5) (B) of the Act. The uniform price is then paid,

under the Louisville order, to producers without any variation or adjustment for the seasonality payments. Several other orders also contain a similar provision for these deductions whereby payments may be made to encourage dairy farmers to produce more milk in the periods of short supply and less milk in the periods of surplus supply.

It has been necessary, in some instances, to exclude milk under certain circumstances from the pool in the computation of the uniform price even though the milk thus deducted was regulated under the order. In *Green Valley Creamery v. United States*, 108 F. 2d 342, 345 (C.A. 1), this provision was held to be valid inasmuch as the "method adopted \* \* \* seems reasonably adapted to promoting the successful operation of the equalization pool" and leeway in this respect is granted by the Act since it "does not specify the detailed method by which a blended or uniform price is to be computed."

In the milk licenses that were issued in 1933 and 1934, provisions were included for special deductions for, and payments to, market agencies for the performance of market-wide services. It was provided in section III, paragraph 4 of the Milk License for the Chicago marketing area that such deductions should be made in order to pay the Milk Foundation for the performance of special services for the market.<sup>28</sup> Also, the milk license

<sup>28</sup> See also, License No. 3 (Philadelphia); License No. 4 (Detroit); License No. 6 (Baltimore); License No. 10 (Louis-

for the Twin City area (Minneapolis and St. Paul) provided for a deduction in the payment of the uniform price, and such deduction was paid to a co-operative "as a service charge"; the price that the nonmembers of the co-operative would have received was thereby reduced by the amount of the "service charge" that was paid to the co-operative association of producers. Under the St. Louis milk order, issued on January 20, 1936, each handler was required to pay to any co-operative association of producers which the Secretary determined to be "rendering service to such handler, a sum not exceeding four (4) cents per hundredweight of milk delivered by the members of such association as a payment for the service of such association to such handler." These provisions in the milk licenses and in the original St. Louis order show that it was recognized at the outset of regulation under this legislation that payments may be made to cooperatives or that deductions may be made in computing or paying the uniform price to producers, and that such deductions may be used to pay some agency to perform market services deemed to be necessary to the effective operation of the program. When the statute was amended in 1935 so as to include the language

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ville); License No. 12 (Evansville); License No. 13 (Des Moines); and License No. 63 (Alameda County, California). The milk licenses are public documents on file in the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D. C. The milk license for the Chicago area is identified as License No. 1.

that now appears in § 8c(5)(A) and (B) it was the intention to include authority in the Act, insofar as prices to producers may be concerned, for the pricing and pooling provisions that were included in the milk licenses issued under the original enactment. See, Sen. Rep. No. 1011, 74th Cong., 1st Sess. (1935), p. 9; and H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9.

Additions as well as deductions are necessary in the computation of the uniform price under § 8c(5)(B) of the Act. The Boston order requires (7 CFR 904.9(g)) an additional payment, under certain circumstances, with respect to the receipts of "outside milk," and such additional payments are included in the computation of the uniform price under § 904.8(b)(2) of the order. Similar provisions have been included in numerous other orders, *e.g.*, the Chicago order (7 CFR 941.6(b)); the Lima order (7 CFR 1950 Supp. 995.11(a)); and the Topeka order (7 CFR 980.6(b)). Also, the payments of interest on delinquent obligations, as required in numerous orders, are additions to the pool in the computation of the uniform price under § 8c(5)(B) of the Act.

A subtraction or deduction, in computing the uniform price under § 8c(5)(B) of the Act, may be made whenever the resulting price arrived at or fixed by this method will tend to achieve the statutory goal. The Act permits the use of any method in fixing the uniform price if the price

thus fixed is, on the basis of the evidence adduced at the hearing, designed to attain the declared purpose of the statute.<sup>29</sup>

The latitude allowed by the statute for fixing the uniform price under § 8c(5)(B) of the Act is indicated by the fact that a milk order is not required by the statute to provide for class prices at all.<sup>30</sup> The pricing provisions in a milk order may be based on "one or more" of the terms or conditions in § 8c(5) of the Act. There is no requirement in the statute for class prices, and there is no basis for saying that the statute requires that the method of computing the uniform price under § 8c(5)(B) result in the payment to producers

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<sup>29</sup> There are a few exceptions not relevant in this case. The Act prohibits some regulatory provisions. See, § 8c(5)(G), § 8c(10), and § 8c(13) of the Act.

<sup>30</sup> The flat price plan was used in some instances by co-operatives prior to this legislation (Bartlett, *Cooperation in Marketing Dairy Products*, pp. 10-11), and it was the avowed purpose of Congress to authorize by § 8c(5) of the Act the various methods of pooling or pricing that were used at times by co-operatives prior to this legislation. See, Sen. Rep. No. 1011, 74th Cong., 1st Sess. (1935), p. 9, and H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9. The pricing provisions in a milk order may, also, be based on only § 8c(5)(A) of the Act. Milk License No. 100 for the evaporated milk industry established minimum prices to be paid to producers for milk delivered to evaporated milk plants and used for the production of evaporated milk but did not require any type of pooling. The license therefore contained a regulation for class prices but did not require the payment of a uniform price to all producers. When the statute was amended in 1935 so as to include the language that now appears in § 8c(5)(A) and in § 8c(5)(B), it was stated that the authorizations contained in § 8c(5)(A) and (B) were designed to include the pricing and pooling provisions that were followed in the issuance of the milk licenses under the original enactment. *Ibid.*

of the aggregate value of the milk computed at class prices under § 8c(5)(A) of the statute. The uniform price may distribute to producers more or less, depending on the various additions and subtractions, than the total value under the class prices. These additions and deductions, in the method of fixing the uniform price, are within the criteria of "incidental" and "necessary" under § 8c(7)(D) of the Act in order to attain the declared purpose of the legislation.<sup>31</sup>

(d) *Co-operative payments for market services are in accord with § 8c(5)(E) of the Act.*

In an affirmative way, the Act expressly recognizes in § 8c(5)(E) that deductions are permissible in the uniform price for milk. Express authorization is given in § 8c(5)(E) of the statute "for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers." To be sure, the market services performed by the co-operatives that qualify for and receive the payments under the Boston order are

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<sup>31</sup> The provisions in § 8c(5)(C) of the Act relate to adjustments "as among handlers" and there is no requirement in this section of the statute that the payment to producers equal the value of the milk purchased by the handlers at the prices fixed in accordance with § 8c(5)(A). There is no question in this case that each handler is required to pay, under the plan for the equalization pool, the aggregate amount required by § 8c(5)(C) of the Act.

more extensive than those referred to in § 8c(5) (E) of the Act. But insofar as the co-operatives perform services by giving market information to non-members of a co-operative, a deduction so as to make payment therefor is expressly authorized by § 8c(5)(E). Some qualified co-operatives in collaborating with other similar associations in strengthening and maintaining the effectiveness of the milk order conduct regular radio programs for the dissemination of market information to producers, and in this manner nonmembers as well as members of co-operatives are informed with regard to current market conditions.<sup>32</sup>

The deductions that are authorized by § 8c(5) (E) of the Act may be paid to any agency that performs the service. In some orders it is provided that the Market Administrator may contract with a co-operative association of producers for furnishing the whole or any part of the service under § 8c(5)(E), and the money thus deducted is paid to the co-operative under the terms of the contract.<sup>33</sup>

The provisions in § 8c(5)(E) of the Act do not

<sup>32</sup> The radio programs are discussed in *New England Dairyman* (September 1941), Vol. 25, No. 9, p. 6; *New England Dairyman* (August 1945), Vol. 29, No. 8, pp. 1 and 3; *New England Dairyman* (September 1945), Vol. 29, No. 9, pp. 1 and 16; *New England Dairyman* (November 1945), Vol. 29, No. 11, p. 2.

<sup>33</sup> See, e.g., the Lowell-Lawrence order (7 CFR 1950 Supp. 934.69). Similar contracts are made with co-operatives under the milk orders for Springfield, Columbus, Toledo, Memphis, Topeka, Nashville, and for the Tri-State area.

purport to be exclusive.<sup>34</sup> Certainly nothing in that section prohibits other necessary provisions that are authorized by other sections of the statute such as § 8c(7)(D). There is, therefore, no basis for regarding this section of the Act as a limitation with respect to the other sections in the statute. *Neuberger v. Commissioner*, 311 U.S. 83, 88; *Springer v. Philippine Islands*, 277 U.S. 189, 206; *Ford v. United States*, 273 U.S. 593, 611.

In determining whether a provision is "inconsistent" with § 8c(5)(E) of the Act, the full context of related sections of the statute are to be considered, along with other indicia of legislative intent. *United States v. Zazove*, 334 U.S. 602, 612. The provisions for co-operative payments would still be authorized if § 8c(5)(E) were not in the Act. Since the provisions for co-operative payments are within the authorization of other terms of the Act and since § 8c(5)(E) of the Act is not intended as an exclusive enumeration which would prohibit or limit the provisions that may be included under other sections of the Act, it cannot be said that the provisions for co-operative payments are inconsistent with § 8c(5)(E) of the Act.

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<sup>34</sup> The Act as a whole reveals a series of alternative provisions for milk orders, and some of the provisions are somewhat repetitive. It is required by the Act that "one or more" terms or conditions set forth in § 8c(7) of the Act also be included in each milk order. The terms of the Act in § 8c(6) for fruits and vegetables are also in the disjunctive and are overlapping in some respects. The provisions of § 8c(7) are also applicable with respect to orders for fruits and vegetables under § 8c(6) of the Act.

Insofar as § 8c(5) (E) of the statute may be relevant in this case, the provisions in the Boston order are consonant with the terms in the Act.

The "inconsistent" limitation in the statute applies only to provisions that are contradictory and antagonistic in the sense that one nullifies the other so that the two cannot coexist. There is no such antithesis or repugnance in this case. The provisions for cooperative payments are in accord with the terms of § 8c(5) of the Act and are also consonant with the declared purpose of the statute to "accord such recognition and encouragement to producer-owned and producer-controlled associations as will be in harmony with the policy toward cooperative associations set forth in existing acts of Congress, and as will tend to promote efficient methods of marketing and distribution" (§ 10(b) (1)). See n. 19, p. 50, *supra*.

2. *The provisions for co-operative payments, for market services, and a uniform price for milk under § 8c(5) of the Act are to be interpreted in the light of the declared legislative purpose to maintain and encourage co-operatives, and to promote efficient methods of marketing and distribution.*

Under this legislation co-operatives are to be maintained and encouraged. It was made plain by Congress in the amendments of August 24, 1935 (49 Stat. 750), that milk orders shall contain such pro-

visions as will encourage co-operatives and be in harmony with the declared purpose of Congress to maintain co-operative associations of producers as essential agencies in the orderly marketing of milk.<sup>35</sup> The position of the co-operatives was strengthened by these amendments to the statute.<sup>36</sup>

It has been recognized that under this legislation the "improved general condition of the market reacts favorably upon persons outside the co-operative as well as those within; thus tempting the less group-minded to enjoy these benefits without any of the costs incidental to the support of the co-operative organization." Nourse, *Marketing Agree-*

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<sup>35</sup> Some of the considerations that were regarded as relevant are stated in *Economic Standards of Government Price Control*, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee), p. 69, as follows:

The cooperative in the market was to be supported. Despite the belief in the permanence of the Federal program on the part of its administrators, the risk was always present that it might sometime be withdrawn. Hence it was thought essential that the existing producer organizations be supported, otherwise the producers would find themselves in a worse position than if the Federal Government had never entered the market. The difficulty was that the Federal Government now performed through its operations some of the previous functions of the cooperative, especially with respect to price. The cooperatives had supported themselves with deductions from the milk checks of their members. If now all in the market were on a similar basis, whether member of the cooperative or not, actual disadvantage would accrue to the cooperative membership because of its additional charge and the cooperatives were fearful of loss of membership and prestige.

<sup>36</sup> Nourse, *Marketing Agreements Under the AAA* (The Brookings Institution, 1935), pp. 255-258; Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), pp. 267-268.

*ments Under the AAA* (The Brookings Institution, 1935), p. 363. This problem had existed in a general way prior to this legislation,<sup>37</sup> and Congress recognized that it might be made more acute by this statute if milk orders failed to encourage the maintenance of co-operative associations of producers by utilizing these agencies in bringing about efficient marketing and distribution in conjunction with the classification, pricing, and pooling of milk under the Federal regulations. In addition, the programs for the regulation of milk marketing under the Act are largely an extension and continuation of the work of co-operative marketing associations prior to this legislation,<sup>38</sup> and it has been

<sup>37</sup> "It had always been a matter of acute concern to co-operatives that, however useful their associations might be, it had never been possible to secure the adhesion of all the growers. Those who were outside were in a position to reap the benefits of united action without having to bear the burdens. This tended to make their net returns even higher than those of members of co-operative associations, thus causing membership to decline, increasing the unit costs of services, weakening the organization's marketing influence, and repeatedly leading to the complete breakdown of the co-operative enterprise." Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), p. 222. This inclination on the part of some producers to avoid the burdens of the co-operative movement, but to share in the benefits, was not peculiar to this country. *Agricultural Cooperation in Scotland and Wales* (The Horace Plunkett Foundation, 1932), pp. 134, 136.

<sup>38</sup> See, *Economic Standards of Government Price Control*, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee in the Investigation of Concentration of Economic Power), pp. 58-59; Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 192-196; Bartlett, *Cooperation in Marketing Dairy Products*, pp. 188-210; *Agricultural Cooperation in the United States* (Farm Credit Administration, April 1947), p. 45 et seq.

recognized by the administrative officials in charge of the milk orders that it "would be impossible to have the type of regulatory program which exists today [under the legislation] without strong co-operative organizations."<sup>30</sup>

The statutory provisions are to be read in the light of the mischief to be corrected and the end to be attained; the words of the Act derive their scope from the use to which they are put and the circumstances under which the words were employed. *Puerto Rico v. Shell Company*, 303 U.S. 253, 258. Regard for the purposes of a remedial act "should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words." *United States v. Dotterweich*, 320 U.S. 277, 280.

The payments to the co-operatives are to reimburse the co-operatives for expenses incurred in the performance of market services. It is still necessary for the co-operatives to collect membership dues,<sup>40</sup> and the co-operative payments constitute only a minor part of the total value of the milk in the pool. Although the total amount of money paid to co-operatives under the New York order since 1938 is \$13,620,151.67 and under the Boston order since 1941 is \$1,521,028, with an additional

<sup>30</sup> Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1939), p. 30.

<sup>40</sup> The collection of membership dues is recognized in § 904.10(e) of the Boston order (7 CFR 904.10(e)).

\$419,126 in escrow under the order of the District Court in this case,<sup>41</sup> the payments to co-operatives constitute only a fraction of 1 percent of the total value of the milk in the pools during this period of time. During the period 1941-1947, when co-operative payments under the Boston order were at higher rates than the rates that have been in effect since 1947, the payments to co-operatives under the Boston order during any year did not exceed 56/100 of 1 percent of the total value of the milk priced and pooled by the order during the same year, and in the years since 1947 the payments earned by the co-operatives have varied from 1/5 of 1 percent to 1/4 of 1 percent of the total value of the milk priced and pooled under the Boston order.<sup>42</sup>

<sup>41</sup> The total amount of money paid to co-operatives under the New York order was computed by adding the periodic amounts shown in the following New York Market Administrator's Bulletins: Vol. 7, No. 5, p. 2; Vol. 9, No. 3, p. 13; Vol. 11, No. 2, p. 9; and the amounts shown in the Announcements of Uniform Price for the months of January 1951 through July, 1951. The total amount of money paid to co-operatives under the Boston order is shown in the Boston Market Administrator's Monthly Statistical Report for November 1950, p. 5, and the amount in escrow is shown in the Boston Market Administrator's Monthly Statistical Report for July 1951, p. 5.

<sup>42</sup> The total value of the milk priced and pooled by the order from 1941 through 1950 is \$474,393,400. In 1945, when the co-operatives received a greater percentage of money from the pool than in any other year, the total value of the milk priced and pooled by the order was \$45,056,900 and the total amount paid to co-operatives was \$254,073. The percentages are obtained by dividing the total payments to co-operatives during each year by the total value of the milk priced and pooled by the order during that year. The yearly payments made to co-operatives are shown in the Boston

The payments to the co-operatives, for performing market services are necessary in order to apportion, in a fair and reasonable manner, the total value of the milk among the producers. This application of the statute is consonant with the practices of co-operative associations of producers prior to the enactment of this legislation. Whenever a co-operative operated a milk pool all of the milk of its members was pooled for sale and also the expenses were pooled. *Relative Prices to Producers Under Selected Types of Milk Pools* (Farm Credit Administration, June 1938), p. 1; Bartlett, *Cooperation in Marketing Dairy Products*, pp. 204-205. "These terms [of classifying, pricing and pooling milk as set forth in the Act] follow the methods employed by cooperative associations of producers prior to the enactment" of this legislation. Sen. Rep. No. 1011, 74th Cong., 1st Sess. (1935), p. 9, and H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9.

The terms of the Act and its legislative history make it plain that co-operative payments for market services are in accordance with the Congressional purpose to authorize the inclusion, in milk orders, of provisions that are designed to maintain and encourage co-operatives as active agencies in the orderly marketing of milk.

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Market Administrator's Monthly Statistical Reports for November 1950, p. 5, and for July 1951, p. 5. The total value of the milk priced and pooled by the order for each year is obtained by adding the monthly values shown in the Boston Market Administrator's Monthly Statistical Reports.

D. Assuming, *arguendo*, that co-operative payments are an "adjustment" in the uniform price for milk; such variation in the payment of the uniform price is expressly authorized by the Act.

We have argued, *infra*, pp. 52-73, that the court below was wrong in holding that payments to the co-operatives are variations or adjustments in the uniform price, and are not authorized by the Act (R. 485). But if we assume, *arguendo*, that co-operative payments are variations in the uniform price for milk, such adjustments are expressly authorized by § 8c(5)(B) of the Act as well as by § 8c(7)(D) of the Act.

1. *Co-operative payments are authorized as adjustments under § 8c(5)(B) of the Act.*

It is provided in § 8c(5)(B) of the Act that one of the variations or adjustments to the uniform price is " \* \* \* (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time." The co-operatives which qualify for and receive these payments perform market services, and incur expenses in the performance of these services (R. 67-69, 183-184). Since such expenses must be reflected in the returns to their producers, it would be difficult, if not impossible,

for these co-operatives to perform the market services without reimbursement or compensation. Inasmuch as these payments for services have been found on the basis of evidence adduced at a public hearing to be necessary to insure orderly marketing and otherwise attain the declared purpose of the Act, it follows that the payments to the co-operatives are necessary "equitably to apportion" the total value of milk among all producers during the respective monthly period.<sup>43</sup>

This provision in the Act, i.e., "equitably to apportion," was originally included in the amendments of August 24, 1935 (49 Stat. 750), and provided for an equitable apportionment among producers on the basis of the "production" of milk during a representative period. But this was further amended by § 2(d) of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 247) by deleting the word "production" and substituting the word "marketings." The legislative history of this statutory authorization for an equitable apportionment of the total value of the pool merely shows that an additional adjustment in the blended price may be made if such is necessary equitably to

<sup>43</sup> An administrative interpretation in 1944 described the co-operative payments in the Boston order as being "necessary to equitably apportion the total value of milk among producers." 9 F.R. 3059. This administrative construction was set forth in an analysis and report—to which exceptions could be filed—of a public hearing at which one of the proposals was to delete from the order the provisions for payments to co-operatives. No basis was disclosed for deleting the provisions, and no change was made in these provisions on the basis of that hearing. 9 F.R. 4972.

apportion the total value of the pool among the producers. Sen. Rep. No. 1011, 74th Cong., 1st Sess., p. 11; H. Rep. No. 1241, 74th Cong., 1st Sess., p. 10.

This statutory authorization is of wide and general import. The term includes, for example, "base rating" or "base and surplus" plans developed by some co-operative associations of producers prior to the enactment of the statute.<sup>44</sup> But there is nothing in the Act to indicate a restrictive scope to the language of the authorization for an adjustment "equitably to apportion" the total value of milk among all producers. If Congress had intended to limit this adjustment to the so-called "base rating" or "base and surplus" plans, it surely would have said so instead of providing for any adjustment that is necessary for an equitable apportionment of the total value of the milk. If Congress makes a choice of language which clearly brings a given situation within the statute, it is unimportant that the existing situation may not have been specifically contemplated by Congress; the reach of the Act includes everything that falls within its scope. *Barr v. United States*, 324 U.S. 83, 90; *Browder v. United States*, 312 U.S. 335, 339-340; *Puerto Rico v. Shell Co.*, 302 U.S. 253, 257. This principle is emphasized when, as in this case, the legislative history does

<sup>44</sup> *Base Allotment or Quota Plans Used by Farmers' Cooperative Milk Associations* (Farm Credit Administration, May 1940), pp. 3-29.

not indicate a narrow construction for the statutory authorization. There is nothing to indicate that the broad term "equitably to apportion" has concealed in it a limitation to a particular plan. The language of the Act is of flexible meaning, and the legislative history affords no basis for a devitalizing interpretation.

Under the plain terms of the Act, any variation may be made in the uniform price if such adjustment is necessary equitably to apportion the total value of the milk purchased by handlers among producers and associations of producers on the basis of their marketings of milk during the respective month. This constitutes an adequate statutory basis on which to sustain the provisions in the order for the payments to co-operative associations of producers.

The payments to the co-operatives are made from the producer-settlement fund, and the payments constitute reimbursement, in part at least, for services to the market. The payments to the co-operatives are necessary in order to apportion in a fair and equitable manner the total value of the milk among the producers. To apportion is to divide in just proportion, although a division may be just without necessarily being an exactly equal division. *Manhattan Co. v. Commissioner*, 297 U.S. 129, 134. By making the deduction from the producer-settlement fund, the deduction applies necessarily on the basis of the marketings of milk

by all of the producers, and under the order the representative period of time is the calendar month. The payments in this manner to the co-operatives for market services result in a fair and just division of the total value of the monthly pool; it is an equitable apportionment and as such is expressly authorized by the Act.

This application of the statutory authorization for an equitable apportionment of the total value of the pool is consonant with the practices of co-operative associations of producers prior to the enactment of this legislation<sup>45</sup> in pooling the milk of its members and also pooling the expenses.

*Relative Prices to Producers Under Selected Types of Milk Pools* (Farm Credit Administration, June 1938), p. 1; Bartlett, *Co-operation in Marketing Dairy Products*, pp. 204-205. The payments in this case are for market services, and these expenses incident to the operation of the pool should be paid from the producer-settlement fund in order that the total value of the pool may be distributed in just proportion.

No issue is presented relative to the correctness of the amount of the payments provided for by the order. No question arises as to whether substantial evidence supports the provisions in the order. The only issue is one of statutory power

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<sup>45</sup> The Act incorporates the methods of pooling and pricing that were employed by the co-operatives prior to this legislation. Sen Rep. No. 1011, 74th Cong., 1st Sess. (1935), p. 9; and H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9.

to make the payments, and the Act is clear that such an adjustment may be made in order to bring about an equitable apportionment of the total value of the milk in the pool. In addition, these provisions of the order for payments to co-operatives for market services "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations" as is required by the Act, and "as will tend to promote efficient methods of marketing and distribution" (§ 10(b)(1) of the Act).

*2. Co-operative payments are authorized as adjustments under § 8c(7)(D) of the Act.*

The reference in § 8c(5) of the statute to the adjustments therein set forth as being the "only" adjustments in the uniform price is qualified by the introductory reference "except as provided in subsection (7)." Milk orders are based on § 8c(7) of the Act, in addition to § 8c(5). Each provision in § 8c(5)(A) and (B) of the Act must be read in the light of the requirement in the introductory provision in § 8c(7) that an order "shall contain" one or more of the terms and conditions in § 8c(7). Hence, the reference in § 8c(5)(A) and (B) of the Act to the adjustments therein set forth as being the only adjustments, means that those are the only adjustments except as provided elsewhere in the statute. This is confirmed by the recognition in § 8c(5)(E) of the Act that additional deductions may be made in paying the uniform price. If

co-operative payments are variations in the payment of the uniform price under § 8c(5)(B)(ii), then the deductions and payments authorized by § 8c(5)(E) are also variations or adjustments in the payment of the uniform price.

The provisions in § 8c(5) of the Act are to be read in the context of the whole statute. This interpretation of the Act is in accord with the principle that meaning and significance should be given to all of the statutory provisions. *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208; *White v. United States*, 305 U.S. 281, 292; *Colorado Interstate Co. v. Commission*, 324 U.S. 581, 602; and *United States v. Zazove*, 334 U.S. 602, 612. The intention of Congress is to be ascertained "not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 93-94.

## II. The Legislative History of Amendatory Action by Congress Recognizes and Approves the Administrative Construction at Issue in This Case

Events since the enactment of the original statute underscore the fact of Congressional recognition and approval of the administrative interpretation that is at issue in this case. In 1937 the Congress

expressly ratified and confirmed all milk orders, milk licenses, milk marketing agreements, and regulations that had been issued prior to that action of Congress in 1937, and also ratified and confirmed all acts thereunder. Act of June 3, 1937, c. 296, § 4, 50 Stat. 249. Some milk licenses and milk orders which had been issued under the Agricultural Adjustment Act, as amended, during the period 1933-1937 provided for special payments or deductions for payments to co-operative associations of producers for market services.

The original Marketing Agreement and License For Milk For The Twin City Area (Minneapolis and St. Paul), issued on August 29, 1933, established a flat price to be paid by handlers for milk purchased from the qualified co-operative association in that area.<sup>46</sup> The handlers who purchased part of their supply of milk from the qualified co-operative and part of their supply of milk from producers who were not members of the co-operative were required to pay to the nonmembers the same price that the co-operative paid to its members, and the difference between that price and the flat price, fixed by the agreement and license, was paid to the co-operative "as a service charge." The price that the nonmembers of the co-operative would have received under the agree-

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<sup>46</sup> The marketing agreement and license are public documents on file in the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D. C., and are identified as Agreement and License No. 5.

ment and license was reduced by the amount of the "service charge" that was paid to the co-operative association. The agreement and license also permitted handlers who purchased all of their supply of milk from producers who were not members of the qualified co-operative to deduct from the flat price, fixed by the agreement and license, the expenses which the handlers incurred with respect to the handling of surplus milk or in processing or manufacturing surplus milk into by-products. This license was terminated on February 16, 1934, but was replaced by License No. 32 effective on February 16, 1934, and the same regulatory provisions, in this respect, were again included in License No. 32, which remained in effect until after the amendatory action of Congress on June 3, 1937, whereby this license and all of its provisions were ratified and confirmed.

The St. Louis milk order, issued on January 30, 1936, established an individual handler pool, specified the class prices to be paid for milk, and required each handler to pay to the producers supplying milk to him the uniform price computed according to the use which the handler had made of all his milk, but the order required each handler to pay to any co-operative association of producers which the Secretary determined to be "rendering service to such handler, a sum not exceeding four (4) cents per hundredweight of milk delivered by the members of such association as a payment for the service of such association to such

handler.”<sup>47</sup> This order was in effect at the time of the enactment of the Act of June 3, 1937, which ratified and confirmed all milk orders and all provisions in such orders. *Cf. Tiaco v. Forbes*, 228 U.S. 549, 555-556.

Further evidence that the Congress intended to permit the Secretary to continue to provide for payments to co-operatives for market services is found in the legislative reports accompanying the 1935 amendments to the Agricultural Adjustment Act. These amendments (Pub. No. 320, 74th Cong., 49 Stat. 750 *et seq.*) contained the terms of the statute now in question, and the reports of both Houses of Congress explained that the terms of the statute, with respect to prices to producers, follow the “provisions of licenses issued pursuant to the present section 8(3) of the Agricultural Adjustment Act.” Sen. Rep. No. 1011, 74th Cong., 1st Sess. (1935), p. 9; and H. Rep. No. 1241, 74th Cong., 1st Sess. (1935), p. 9. Some of the licenses issued pursuant to § 8(3) of the Agricultural Adjustment Act contained provisions compensating co-operatives for the performance of market services.

If the action by Congress in 1935 and in 1937 is not conclusive as to the scope of the authority under the Act, it is necessary to believe that Congress intended to allow deductions for co-operative

<sup>47</sup> This order is identified as Order No. 3, and is a public document on file in the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D. C.

payments under the marketing provisions of the Agricultural Adjustment Act of 1933, as amended, but intended to deny that authority under the same language as reenacted. It is hardly conceivable or explicable that Congress intended, under the circumstances revealed in the legislative history, for the reenacted language to be more restrictive than the original enactment. *United States v. Yazove*, 334 U.S. 602.

The co-operative payments under the New York order were brought to the attention of Congress in 1940. A confirmatory or clarifying amendment was submitted with respect to the authority of the Secretary to include these provisions in a milk order. S. 3426, 76th Cong., 3rd Sess. This amendment was described in Sen. Rep. No. 1719, 76th Cong., 3rd Sess., p. 8, as covering services that are "identifiable as benefiting all producers with a reasonable degree of equality," and which are "definitely associated with the proper functioning of an order program and the effectuation of the policy of the act." The Committee report plainly stated that authority to provide payments to co-operatives for such services was "already contained in the act" and that the purpose of the clarifying amendment was to "establish more explicit standards" to guide the Secretary in providing for compensation for such services. *Ibid.* See, to the same effect, 86 Cong. Rec. 12258-12259; and Hearings, Subcommittee of

Senate Committee on Agriculture and Forestry, on S. 3426, 76th Cong., 3rd Sess., pp. 52-53, and 75. This bill contained numerous other amendments some of which were extremely controversial, but there was "complete unanimity of opinion" with respect to the section specifically providing for payments to co-operatives for market-wide services. 86 Cong. Rec. 12256. The bill passed the Senate after controversial amendments as to other matters had been deleted on the floor. 86 Cong. Rec. 12266. No action was taken on the bill by the House Committee, and the measure never reached the House floor for a vote. It does not appear whether the House Committee regarded the bill as unnecessary or whether, in view of the time remaining before the end of the session of Congress and the controversial nature of amendments that had been urged in the Senate, it was not regarded as feasible to hold hearings on the bill. The unanimous action by the Senate, the only branch of Congress which expressed itself one way or the other in approving the authorization for cooperative payments, is a definite manifestation of legislative policy favorable to the interpretation by the Secretary as to the ambit of his authority under the Act. *Sioux Tribe v. United States*, 316 U.S. 317, 329. Also see, *United States v. Zazove*, 334 U.S. 602, 620-622. Legislative history of this character was also considered in *New York v. Saper*, 336 U.S. 328, 338-341. In circumstances such as these, the failure of the House to take any action on the bill is

without meaning for the purposes of statutory interpretation. *Cf. Order of Conductors v. Swan*, 329 U.S. 520, 529; *Gemco, Inc. v. Walling*, 324 U.S. 244, 260-265.

In addition, the Act of July 3, 1948, c. 827, 62 Stat. 1258, made certain amendments in the statute with respect to milk orders; and then provided in Title III, § 302(e), of the Act of July 3, 1948 (7 U.S.C. Supp. IV, 672), that all milk orders in effect "shall continue in effect without the necessity for any amendatory action." Various changes were made in § 8c of the Act, but no change was made in the language of § 8c now under consideration.

The action of Congress, under these circumstances in 1935, 1937, 1940, and 1948, manifests legislative recognition and approval of the administrative construction of the statute. *United States v. Zazove*, 334 U.S. 602, 622. Also see, *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492-493; *Costanzo v. Tillinghast*, 287 U.S. 341, 345; *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U.S. 269, 273; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-489; and *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 365-366.

### III. The Contemporaneous and Settled Administrative Construction of the Act Is Entitled to Great Weight

The provisions for co-operative payments were included in the New York milk order in 1938 (7

CFR 927.1 *et seq.*). The Boston order was amended in 1941 so as to provide for co-operative payments, and subsequently provisions for co-operative payments were included in the Cincinnati milk order (7 CFR 965.1 *et seq.*), and also the Dayton-Springfield order (7 CFR 971.1 *et seq.*). Payments or deductions for payments to co-operatives were provided for in some of the milk licenses and milk orders issued during the period 1933-1937, *supra*, pp. 61-63. Various milk orders have been amended from time to time to provide for deductions in the computation of the uniform price for payments similar to co-operative payments. See, *e.g.*, the Louisville milk order (7 CFR 946.1 *et seq.*) for provisions that provide for seasonality payments, and the original New York order (7 CFR 1938 Supp. 927.1 *et seq.*) for provisions that provide for diversion payments to handlers for market-wide services. There can be no doubt of the broad administrative construction of the Act over a long period of time. These statutory provisions have been applied to a wide variety of economic problems in order to bring about orderly marketing, insure in the public interest an adequate supply of milk throughout the year, and also accord proper recognition and encouragement to producer-owned and producer-controlled co-operative associations, as required by the Act, "and as will tend to promote efficient methods of marketing and distribution."

These administrative interpretations over a period of approximately 18 years are of significance in resolving the issues in this case. The contemporaneous and settled administrative interpretation should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States v. Jackson*, 280 U.S. 183, 193. Also see, *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549; *Fleming v. Mohawk Co.*, 331 U.S. 111, 116; *Boutell v. Walling*, 327 U.S. 463, 470-471.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be reversed and the complaint dismissed.

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SEPTEMBER 1951.

## APPENDIX A

The following are relevant sections of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, amending the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended (7 U.S.C. 601 *et seq.*):

## Orders

Sec. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

\* \* \* \* \*

*Notice and Hearing*

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

### *Finding and Issuance of Order*

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

### *Terms—Milk and Its Products*

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) *Providing:*

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers

and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing, (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for

assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

\* \* \* \* \*

### *Terms Common to all Orders*

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsec-

tions (5), (6), and (7) and necessary to effectuate the other provisions of such order.

\* \* \* \* \*

Sec. 10(b)(1). \* \* \* The Secretary, in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

#### APPENDIX B

1. The following are relevant findings (6 F.R. 3762 and 12 F.R. 4921) and sections of the Boston milk order, as amended. (12 F.R. 4921, 7 CFR 904.1 *et seq.*):

The amended order effective August 1, 1941, contains the following findings of fact (6 F.R. 3762, 7 CFR 1941 Supp., 904.0):

(a) The Secretary finds, upon the evidence introduced at the hearings, said findings being in addition to the findings made upon the evidence introduced at the original hearings on this part, and on amendments to said order, and being in addition to the other findings and determinations made prior to or at the time of the original issuance of said order, and of amendments thereto (which findings are hereby ratified and affirmed save only as such findings are in conflict with the findings hereinafter set forth): \* \* \*

(3) That the provisions relating to the payments out of the equalization pool to co-operative associations performing certain marketing services are incidental to, not inconsistent with, the other provisions of the order, as amended, and necessary to effectuate the other provisions of the order, as amended; \* \* \*

(6) That the issuance of this order, as amended, and all of its terms and conditions will tend to effectuate the declared policy of the act. \* \* \*

2. The amended order effective August 1, 1947, contains the following findings of fact (12 F.R. 4921, 7 CFR 1947 Supp., 904—Appendix):

(a) *Findings* \* \* \* Upon the basis of the evidence introduced at such hearings and the record thereof, it was found that:

(1) The said order, as amended and as hereby further amended, and all of the terms and conditions of said order, as amended and as hereby further amended, will tend to effectuate the declared policy of the act: \* \* \*

The foregoing findings are supplementary and in addition to the findings made in connection with the issuance of the aforesaid order and the findings made in connection with the issuance of each of the previously issued amendments thereto; and all of said previous findings are hereby ratified and affirmed except insofar as such findings may be in conflict with the findings set forth herein.

3. The following are the relevant sections of the Boston milk order, as amended (12 F.R. 4921, 7 CFR 1947 Supp., 904.8—904.10):

§ 904.8 *Minimum blended prices to producers*—(a) *Computation of value of milk received from producers*.—For each month, the market administrator shall compute the value of milk received from producers which is sold, distributed, or used by each pool handler, in the following manner:

(1) Multiply the quantity of milk in each class by the price applicable pursuant to § 9047(a) and (b);

(2) Add together the resulting value of each class; and

(3) Adjust the value determined in subparagraph (2) of this paragraph as provided in § 904.7 (d).

(b) *Computation of the basic blended price*.—The market administrator shall compute the basic blended price per hundredweight of milk delivered during each month in the following manner:

(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each pool handler from whom the market administrator has received at his office, prior to the 11th day after the end of such month, the report for such month and the payments required pursuant to § 904.9(b) (2) and (g) for milk received during each month since the effective date of the most recent amendment of this part;

(2) Add the total amount of payments re-

quired from handlers pursuant to § 904.9(g);

(3) Add the amount of unreserved cash on hand at the close of business on the 10th day after the end of the month from payments made to the market administrator by handlers pursuant to § 904.9;

(4) Deduct the amount of the plus differentials, and add the amount of the minus differentials, which are applicable pursuant to § 904.9(e);

(5) Subtract the total amount of cooperative payments required by § 904.10(b);

(6) Divide by the total quantity of milk for which a value is determined pursuant to subparagraph (1) of this paragraph; and

(7) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in § 904.9. This result shall be known as the basic blended price for milk containing 3.7 percent butterfat.

(c) *Announcement of blended prices.*—On the 12th day after the end of each month the market administrator shall mail to all pool handlers and shall publicly announce:

(1) Such of these computations as do not disclose information confidential pursuant to the act;

(2) The zone blended prices per hundred-weight resulting from adjustment of the basic blended price by the differentials pursuant to § 904.9(e); and

(3) The names of the pool handlers, designating those whose milk is not included in the computations.

§ 904.9 *Payments for milk*—(a) *Advance payments*.—On or before the 10th day after the end of each month, each pool handler shall make payment to producers for the approximate value of milk received during the first 15 days of such month. In no event shall such advance payment be at a rate less than the Class II price for such month. The provisions of this paragraph shall not apply to any handler who, on or before the 17th day after the end of the month, makes final payment as required by subparagraph (1) of paragraph (b) of this section.

(b) *Final payments*.—On or before the 25th day after the end of each month, each pool handler shall make payment for the total value of milk received during such month as required to be computed pursuant to § 904.8 (a), as follows:

(1) To each producer at not less than the basic blended price per hundredweight, subject to the differentials provided in paragraphs (d) and (e) of this section, for the quantity of milk delivered by such producer; and

(2) To producers, through the market administrator, by paying to, on or before the 23rd day after the end of each month, or receiving from the market administrator, on or before the 25th day after the end of each month, as the case may be, the amount by which the payments required to be made pursuant to subparagraph (1) of this paragraph are less than or exceed the value of milk as required to be computed for such handler pursuant to § 904.8(a),

as shown in a statement rendered by the market administrator on or before the 20th day after the end of such month.

(c) *Adjustments of errors in payments.*—Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments pursuant to subparagraph (2) of paragraph (b) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 15 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is payable by the market administrator to any handler, the market administrator shall, within 15 days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of an amount less than is required by this section, the handler shall make up such payment to the producer not later than the time of making final payment for the month in which such error is disclosed.

(d) *Butterfat differential.*—Each pool handler shall, in making the payments to each producer for milk received from him, add for each one-tenth of 1 percent of average butterfat content above 3.7 percent or deduct for each one-tenth of 1 percent of average butterfat content below 3.7 percent an amount per hundredweight which shall be calculated by the market administrator as follows: divide by 33.48 the weighted average price per 40-quart

can of 40 percent bottling quality cream, f.o.b. Boston, as reported by the United States Department of Agriculture for the period between the 16th day of the preceding month and the 15th day inclusive of the month during which such milk is delivered, subtract 1.5 cents, and divide the result by 10: *Provided*, That if no such cream price is reported, multiply the average price reported for such period by the United States Department of Agriculture for U.S. Grade A (U.S. 92-score) butter at wholesale in the Chicago market by 1.4, subtract 1.5 cents, and divide the result by 10.

(e) *Location differentials*.—The payments to be made to producers by handlers pursuant to subparagraph (1) of paragraph (b) of this section shall be subject to the differentials set forth in Column B of the table in § 904.7(c), and to further differentials as follows:

(1) With respect to milk delivered by a producer whose farm is located more than 40 miles but not more than 80 miles from the State House in Boston, there shall be added 23 cents per hundredweight, unless such addition gives a result greater than the Class I price pursuant to § 904.7(a) and (c) which is effective at the plant to which such milk is delivered, in which event there shall be added an amount which will give as a result such price.

(2) With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight, unless such addition gives a result greater than

the Class I price pursuant to § 904.7(a) and (c) which is effective at the plant to which such milk is delivered, in which event there shall be added an amount which will give as a result such price.

(f) *Other differentials.*—In making the payments to producers set forth in subparagraph (1) of paragraph (b) of this section, pool handlers may make deductions as follows:

(1) With respect to milk delivered by producers to a city plant which is located outside the marketing area and more than 14 miles from the State House in Boston, 10 cents per hundredweight;

(2) With respect to milk delivered by producers to a country plant, at which plant the average daily receipts of milk from producers are:

(i) Less than 17,000 but greater than 8,500 pounds, 4 cents per hundredweight; and

(ii) 8,500 pounds or less, 8 cents per hundredweight.

§ 904.10 *Payment to cooperative associations*—(a) *Application and qualification for cooperative payments.*—Any cooperative association of producers duly organized under the laws of any state may apply to the Secretary for a determination that it is qualified to receive cooperative payments in accordance with the provisions of this section. Upon notice of the filing of such an application, the

market administrator shall set aside for each month, from the funds provided by handlers' payments to the market administrator pursuant to § 904.9, such amount as he estimates is ample to make payment to the applicant, and hold it in reserve until the Secretary has ruled upon the application. The applicant association shall be considered to be a qualified association entitled to receive such payments from the date fixed by the Secretary, if he determines that it meets all of the following requirements.

(1) It conforms to the requirements relating to character of organization, voting, dividend payments, and dealing in products of non-members, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

(6) It constantly maintains close working relationships with its members.

(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

(8) It is in compliance with all applicable provisions of this order.

(b) *Cooperative payments.*—On or before the 25th day after the end of each month, each qualified association shall be entitled to receive a cooperative payment from the funds provided by handlers' payments to the market administrator pursuant to § 904.9. The payment shall be made under the conditions and at the rates specified in this paragraph, and shall be subject to verification of the receipts and other items upon which such payment is based.

(1) Each qualified association shall be entitled to payment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to § 904.9(b)(2) and § 904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (e) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to

this subparagraph shall be at such lower rate.

(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association.

(c) *Reports relating to cooperative payments.*—Each qualified association shall, upon request by the market administrator, make reports to him with respect to its use of cooperative payments and its performance in meeting the requirements set forth as a basis for such payments, and shall file with him a copy of its balance sheet and operating statement at the close of each fiscal year.

(d) *Suspension of cooperative payments.*—Whenever there is reason to believe that an association is no longer meeting the qualification requirements, the market administrator shall, upon request by the Secretary, suspend cooperative payments to it, and shall give the association written notice of the suspension. Such suspended payments shall be held in reserve until the Secretary has, after notice and opportunity for a hearing, ruled upon the performance of the association.

(e) *Deductions from payments to members.*—(1) Each association which is entitled to receive cooperative payments on milk which its producer members delivered to a handler other than a qualified association may file a claim with the handler for amounts to be deducted from the handler's payments to such members. The claim shall contain a list of the producers, an agreement to indemnify the handler in the

making of the deductions, and a certification that the association has an untermiated membership contract with each producer, authorizing the claimed deduction.

(2) In making payments to his producers for milk received during the month, each handler shall make deductions in accordance with the association's claim, and shall pay the amount deducted to the association within 25 days after the end of the month.

